TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 49

NORMAN C. BERNHARDT, PETITIONER,

vs.

POLYGRAPHIC COMPANY OF AMERICA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 16, 1955

CERTIORARI GRANTED MAY 31, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

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IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

Appendix to Appellant's Brief

DOCKET ENTRIES

March 5. Filed Petition for Removal from Bennington County Court, State of Vermont and removal costs bond.

March 10. Filed Defendant's Answer and Counterclaim, Notice of Apearance of Guy Page, Jr., Esq., and McNamara and Larrow for defendant and notice under Rule 5.

April 23. Filed Plaintiff's Answer to Defendant's Counterclaim, Certificate and Notice under Rule 5.

April 22. Filed notice to take Deposition and Certificate.

May 6. Filed Motion for Stay of Proceedings.

June 22. Petition for temporary injunction.

June 22. Hearing on Motion for Stay of Proceedings, M. W. Ehrich, Jr., Esq., and E. V. Clark, Esq., appeared for plaintiff, J. A. McNamara, Esq., and Guy Page, Jr., Esq., appeared for defendant, decision reserved.

July 9. Filed Findings of Fact, Conclusion of Law, and order denying defendant's motion to stay and denying plaintiff's petition for temporary injunction; mailed copy to attorneys.

July 20. Filed notice of Examination by plaintiff before trial and certificate of service.

July 28. Filed notice of appeal by defendant. Mailed copy to M. W. Ehrich, Jr., Esq., and E. V. Clark, Esq.

[fol. 4] IN UNITED STATES DISTRICT COURT

PETITION FOR REMOVAL—Filed March 5, 1954

To the United States District Court for the District of Vermont:

Petitioner, Polygraphic Company of America, Inc., respectfully shows:

(1) Petitioner is the defendant in the above entitled action.

(2) The above entitled action was commenced in the

County Court within and for the County of Bennington, State of Vermont, and is now pending in that court. Process was served on the petitioner on the Fifteenth day of February, 1954. A copy of the plaintiff's complaint setting forth the claim for relief upon which the action is based was first received by the petitioner upon the said Fifteenth day of February, 1954.

(3) The action is a civil action for breach of contract for employment seeking damages for discharge of the plaintiff by the defendant, and the United States District Court for the District of Vermont has jurisdiction by reason of the diversity of citizenship of the parties.

(4) The plaintiff is and was at the time the action was commenced a citizen of the State of Vermont. The defendant is and was at the time the action was commenced, a corporation, incorporated and existing under and by virtue of the laws of the State of New York; and a citizen of that State. The matter in controversy exceeds, exclusive of interest and costs the sum of Three Thousand Dollars ($3,000).

(5) Defendant Polygraphic Company of America, Inc. files herewith a bond, with good and sufficient sureties, for paying all costs and disbursements incurred by reason of these removal proceedings, if this court shall hold that the [fol. 5] action was not removable or improperly removed thereto, as provided by the statutes of the United States.

Your petitioner therefore prays for removal of the above entitled cause from the state court to this court.

Know all men by these presents, that Polygraphic Company of America, Inc., the above named defendant, as principal, and Guy Page, Jr., as surety, are held and firmly bound to Norman C. Bernhardt, plaintiff, in the above-entitled cause; his heirs and assigns in the sum of Five Hundred Dollars ($500.) lawful money of the United States of America, for the payment of which, well and truly to be made, we, and each of us, bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

The condition of this obligation is such that:

Whereas, Polygraphic Company of America, Inc., has applied by petition to the United States District Court for the District of Vermont for the removal of a certain cause pending in the county court within and for the County of Bennington, State of Vermont, wherein Norman C. Bernhardt is plaintiff and Polygraphic Company of America, Inc., is defendant, to the United States District Court for the District of Vermont, for further proceedings on the grounds in said petition set forth:

Now, therefore, if petitioner Polygraphic Company of America, Inc., shall pay all costs and disbursements incurred by reason of the removal proceedings if it should be determined that the cause was not removable or was improperly removed to the district court, then this obligation shall be void; otherwise it shall remain in full force and effect.

In witness whereof, we, the principal and surety, have caused this instrument to be executed this 5th day of March, 1954.

Polygraphic Corporation of America, Inc., by Robert M. Werblow, President; Guy Page, Jr., Surety.

[fol. 6] State of Vermont,
Bennington County, ss:

To Any Sheriff or Constable in the State; or to an Indifferent Person, Greeting:

By the Authority of the State of Vermont, You are hereby commanded to attach the goods, chattels or estate of Polygraphic Company of America, Inc., a corporation created, organized and existing under and by virtue of the laws of the State of New York with an office and principal place of business in Bennington in said County to the value of Thirty-one Thousand Dollars ($31,000) and it notify thereof according to law; and also notify it to appear before the Bennington County Court at said Bennington within and for the County of Bennington and also to notify it to cause its appearance herein, to be entered with the clerk of said Court, on or before the expiration of forty-two days from the date hereof, then and there in said Court to answer to Norman C. Bernhardt of said Bennington.

1. In a Plea of contract that at Bennington in said County on the 19th day of July, 1952, said defendant, hereinafter called the company, being desirous of engaging said plaintiff as superintendent for its lithographic plant at said Ben-

nington, did then and there mutually agree with said plaintiff in words and figures as follows:

"Agreement made and entered into this 19th day of July, 1952 by and between Polygraphic Company of America, Incorporated, a corporation duly organized and existing under and by virtue (sic) of the laws of the State of New York and having its principal office at 310 East 45th Street, Borough of Manhattan, City and State of New York, hereinafter called the 'Employer', and

"Norman C. Bernhardt, residing at 12 Forbes Road, Tuckahoe, County of Westchester, State of New York, hereinafter referred to as 'Employee',

"**Witnesseth:**

"Whereas, Employer is engaged in the lithographic and [fol. 7] printing business in all of its branches and maintains a lithographic plant in North Bennington, Vermont; and

"Whereas, Employee has been engaged and has had long experience in said business; and

"Whereas, Employee is anxious and willing to be employed by Employer, and Employer is willing and desirous of employing Employee, all upon the terms, covenants and conditions hereinafter set forth.

"Now, Therefore, for and in consideration of the mutual promises and agreements hereinafter set forth, and other good and valuable considerations, receipt whereof is hereby acknowledged, it is agreed as follows:

"First: Employer does hereby employ, engage and hire Employee as its superintendent of its lithographic plant at North Bennington, Vermont, and Employee does hereby accept and agree to such hiring, engagement and employment. Subject to the general supervision and pursuant to the orders, advice and direction of the Employer, Employee shall have charge of and be responsible for the operation of said lithographic plant in North Bennington, shall perform such other duties as are customarily performed by one holding such position in other, same of similar businesses or enterprises as that engaged in by the Employer, and shall also additionally render such other and unrelated services and duties as may be assigned to him from time to time by Employer.

"Second: Employee agrees that he will at all times faithfully, industriously and to the best of his ability, experience and talents perform all of the duties that may be required of and from him pursuant to the express and implicit terms hereof, to the reasonable satisfaction of Employer. Such duties shall be rendered at North Bennington, Vermont and at such other place or places as Employer shall in good faith require or as the interests, needs, business and opportunities of Employer shall require or make advisable.

"It is understood and agreed and is a condition of this agreement that on or before the beginning of the term of this agreement, Employee shall move his residence from Tuckahoe, New York and shall take up residence in the immediate area of North Bennington, Vermont with his family.

"Third: The term of this agreement shall be for a period of three years commencing August 1, 1952 and terminating July 31, 1955, subject, however, to prior termination as is hereinafter provided for.

[fol. 8] "Fourth: Employer shall pay Employee and Employee agrees to accept from Employer, in full payment for Employee's services hereunder, compensation at the rate of $15,000.00 per annum, payable twice a month on the 15th and 1st days of each month during which this agreement shall be in force; the compensation for the period commencing August 1, 1952 through August 15, 1952 shall be payable on August 15, 1952.

"In addition to the foregoing, Employer agrees that it will reimburse Employee for any and all necessary, customary and usual expenses incurred by him while traveling for and on behalf of the Employer pursuant to Employer's directions.

"Fifth: Notwithstanding anything in this agreement to the contrary, Employer is hereby given the option to terminate this agreement in the event that Employee shall, during the term hereof, become permanently disabled as the term permanently disabled is hereinafter fixed and defined. Such option shall be exercised by Employer giving notice to Employee by registered mail, addressed to him in care of Employer at North Bennington, Vermont, or at such other address as Employee shall designate in writing sent to Employer by registered mail, return receipt requested, postage prepaid at 310 East 45th Street, New York, New York, of its intention to terminate this agreement on the last day of the month during which such notice is mailed as aforesaid and thereupon, upon the giving of such notice, this agreement and the term hereof shall cease and come to an end upon the last day of the month in which the said notice is so mailed, with the same force and effect as if such last day of the month were the date originally herein set forth as the termination date hereof.

"For the purposes of this agreement Employee shall be deemed to have become permanently disabled, if, during any year of the term hereof, because of ill health, physical or mental disability or for other causes beyond his control he shall have been continuously unable, unwilling or failed to have performed his duties hereunder for 90 consecutive days, or if, during any year of the term hereof, he shall have been unable, unwilling or have failed to perform his duties for a total period of 150 days, be such days consecutive and successive or not. For the purposes hereof the term 'any year of the term hereof' is defined to mean any 12 calendar month period commencing August 1 and terminating July 31 of the following year during the term hereof.

"Sixth: Anything herein contained to the contrary notwithstanding, in the event that Employer shall discontinue operating its lithographic plant at North Bennington, Vermont, then this agreement shall cease and terminate as of the last day of the month in which Employer ceases operations at the said plant with the same force and effect as if [fol. 9] said last day of the month were originally set forth as the termination date hereof.

"Seventh: Employer shall devote all of his time, attention, knowledge and skill solely and exclusively to the business and interest of Employer, and Employer shall be entitled to all of the benefits, emoluments, profits or other issues arising from or incident to any and all work, services and advice of Employee, and Employee expressly agrees that he will not, during the term hereof, be interested, directly or indirectly, in any form, fashion or manner, as partner, office (sic), director, stockholder, advisor, employee or in any other form or capacity in any other business similar to Employer's business or any allied trade; provided, however, that nothing herein contained shall be deemed to prevent or limit the right of Employee to invest (sic) any of his surplus funds in the capital stock or other securities of any corporation whose stock or securities are publicly owned or are regularly traded on any public exchange, nor shall anything herein contained be deemed to prevent Employee from investing or limit Employee's right to invest his surplus funds in real estate.

"Eighth: Employee further specifically agrees that he will not at any time, in any fashion, form or manner, either directly or indirectly, divulge, disclose or communicate to any person, firm or corporation in any manner whatsoever any information of any kind, nature or description concerning any matters affecting or relating to the business of Employer, including without limiting the generality of the foregoing, any of its customers, the prices it obtains or has obtained or at which it sells or has sold its products, or any other information of, about or concerning the business of Employer, its manner of operation, its plans, processes or other data of any kind, nature or description without regard to whether any or all of the foregoing matters would be deemed confidential, material or important, the parties hereto stipulating that as between them, the same are important, material and confidential and gravely affect the effective and successful conduct of the business of the Employer; and its goodwill, and that any breach of the terms of this paragraph are a material breach hereof.

"Ninth: It is expressly understood and agreed that Employee shall not be entitled to any additional compensation by reason of any service which he may perform as a member of any managing committee of Employer, or in the event that he shall at any time be elected an officer or director of Employer.

"Tenth: Anything here contained to the contrary, notwithstanding, it is expressly understood and agreed that [fol. 10] Employee shall not have the right to make any contracts or commitments for or on behalf of Employer without the written consent of Employer first had and obtained.

"Eleventh: The parties hereto do agree that any differences, claims or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere.

"Twelfth: This agreement contains the sole and entire agreement between the parties and shall, as of the effective date hereof, supersede any and all other agreements between the parties. The parties acknowledge and agree that neither of them has made any representation with respect to the subject matter of this agreement or any representations inducing the execution and delivery hereof except such representations as are specifically set forth herein and each of the parties hereto acknowledges that he or it has relied on his or its own judgment in entering into the same. The parties hereto further acknowledge that any statements or representations that may have heretofore been made by either of them to the other are void and of no effect and that neither of them has relied thereon in connection with his or its dealings with the other.

"Thirteenth: The parties hereto do further agree that no waiver or modification of this agreement or of any covenant, condition or limitation herein contained shall be valid unless in writing and duly executed by the party to be charged therewith and that no evidence of any waiver or modification shall be offered or received in evidence in any proceeding, arbitration or litigations between either of the parties hereto arising out or affecting this agreement, or the rights or obligations of any party hereunder, unless such waiver or modification is in writing, duly executed as aforesaid, and the parties further agree that the provisions of this Paragraph Thirteenth hereof may not be waived except as herein set forth.

"Fourteenth: The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance [fol. 11] with and under and pursuant to the laws of the State of New York and that in any action special proceeding or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted.

"Fifteenth: This agreement shall be binding upon and inure to the benefit of the respective parties hereto and their executors, administrators, heirs, personal representatives, successors and assigns.

"In witness whereof the parties hereto have duly executed this agreement the 31st day of July, 1952.

Polygraphic Company of America, Inc., by (S.) R. W. Werblow, President. (S.) Norman C. Bernhardt, (T.) Norman C. Bernhardt''

2. Pursuant to the terms of said contract plaintiff entered into the employment of said company on August 1, 1952, and thereafter fully performed and fulfilled all terms, promises and *con*-conditions on his part to be performed and fulfilled.

3. Yet said company, not regarding said terms, promises, conditions on its part to be performed and fulfilled and in breach thereof at said Bennington, on the 22nd day of October, 1953, did then and there discharge said plaintiff from its employment without cause and thereafter ceased and refused to pay said plaintiff his wages and compensation pursuant to said contract.

4. That as a result of said breach of contract on the part of the said company said plaintiff has been required to seek other employment to his great expense and damage and said plaintiff as a result of said breach has suffered and will continue to suffer great loss of wages and compensation during the term of said contract.

5. All to the damage of the said plaintiff in the amount

of Thirty Thousand Dollars ($30,000) for the recovery of which with just costs plaintiff brings suit.

[fol. 12] Fail not, but service and return make within twenty-one days from the date hereof.

Dated at Bennington in the County of Bennington the 10th day February, 1954.

(S.) George H. Plumb, Bennington County Clerk.

/s/ Eugene V. Clark recognized to the Defendant in the sum of Fifty Dollars ($50) and to each of the above named Trustees in the sum of Fifty ($50) Dollars, as surety for the costs of prosecution, as the law directs.

Before me, (S.) George H. Plumb, Bennington County Clerk.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER AND COUNTERCLAIM—Filed March 10, 1954

Now comes Polygraphic Company of America, Inc., by its attorneys, Guy Page, Jr. and McNamara and Larrow, and by way of answer to plaintiff's complaint in said action says:

1. Defendant admits the allegations contained in Paragraph numbered "1" of the complaint.

2. Defendant admits that the plaintiff entered into its employment August 1, 1952, but denies each and every other allegation contained in Paragraph numbered "2" of the complaint.

3. Defendant denies each and every allegation contained in the Paragraph numbered "3" of the complaint, and says that it discharged plaintiff on the 22nd day of October, 1953, for good cause, viz., that the plaintiff had by his negligent and unskillful performance of duties destroyed the defendant's product in the amount of $27,000.00, and that plaintiff had been secretly for some time prior thereto engaged in an effort to induce defendant's employees to [fol. 13] leave defendant's employ and enter the employment of a competing enterprise under plaintiff's management.

4. Defendant denies each and every allegation contained in the Paragraphs numbered "4" and "5" of the complaint.

5. And for a further defense the defendant says that the plaintiff has not duly performed all the conditions precedent of said contract on his part, but, on the contrary, although said contract contained a provision, of which the following is a copy:

> "Eleventh: The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere."

And the defendant says that plaintiff has refused to submit to arbitration the subject matter of the present controversy, and that in breach of the aforesaid clause he has brought suit in a court of law, to wit, the county court within and for the County of Bennington, State of Vermont. Defendant shows that the agreement between plaintiff and defendant contain a provision, of which the following is a copy:

> "Fourteenth: The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the state of New York and that in any action special proceeding or other proceeding that may be

brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the juris- [fol: 14] diction in which any action or special proceeding may be instituted."

Defendant says that by virtue of the aforesaid clause the law applicable to the rights of the parties to this proceeding is the law of the State of New York, and not the law of the State of Vermont; and that by virtue of the said law of the State of New York plaintiff is not entitled to maintain this action so long as he continues to be in breach of said provision numbered "Eleventh" in said agreement.

6. And for a further defense defendant says that plaintiff has breached the agreement upon which he seeks recovery, in that he has failed to perform the article "Eleventh" of the said agreement, as set forth in the Paragraph numbered "5" of this answer, and that by virtue of the article numbered "Fourteenth" of the said agreement, as set forth in the Paragraph "5" of this answer, the effect of the plaintiff's said breach of his undertaking in said article "Eleventh" of the said agreement, is to be determined by the law of the State of New York; and that by virtue of the said law of the State of New York, the plaintiff's said the said breach is so far material to the object of the said breach is so far material to the object of the said agreement that the said breach in itself must defeat the plaintiff's recovery in this action.

DEFENDANT'S COUNTERCLAIM

Defendant counterclaims and shows that at Bennington, in the County of Bennington and State of Vermont, on divers days between the first day of August, 1952 and the 22nd day of October, 1953, plaintiff by reason of the unskilled performance of his duties did carelessly and negligently destroy, or allow to be destroyed, products of the defendant having an aggregate value of $27,000.00, thereby damaging the defendant in the amount of $27,000.00 for which, with just costs, defendant asks judgment.

[fol. 15] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ANSWER TO DEFENDANT'S COUNTERCLAIM—Filed April 23, 1954

Now comes Norman C. Bernhardt, by his attorneys, Manfred W. Ehrich, Jr., and Eugene V. Clark and answering the defendant's counterclaim in the above entitled cause.

Denies each and every allegation contained therein.

Wherefore the plaintiff, Norman C. Bernhardt, asks judgment with his costs.

Norman C. Bernhardt vs. Polygraphic Company of America, Inc., Civil Action —, File No. —.

[fol. 16] IN UNITED STATES DISTRICT COURT

MOTION FOR STAY OF PROCEEDINGS—Filed May 6, 1954

Comes now Polygraphic Company of America, Inc., by its attorneys, Guy Page, Jr., and McNamara and Larrow, and shows that:

1. At the City of New York in the State of New York on July 31, 1952, plaintiff and defendant entered into a contract of employment, which contained articles as follows:

"Eleventh: The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere.

[fol. 17] "Fourteenth: The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of New York and that in any action, special proceeding or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted."

On October 22, 1953, defendant discharged plaintiff asserting as a cause, among others, that plaintiff had negligently permitted the destruction of defendant's property to the value of Twenty-seven thousand ($27,000.00) dollars.

2. Under the law of the State of New York the plaintiff cannot revoke his agreement to submit to arbitration disputes between the parties to the contract of employment arising between them out of that contract, or connected therewith; but, on the contrary defendant has a right to secure the appointment of arbitrators and to cause the award of such arbitration to be entered as a judgment in bar of any action arising out of matters submitted to such arbitrators.

3. The law of New York governs, to the exclusion of the law of Vermont, the determination of the issue as to whether plaintiff can revoke his agreement to arbitrate, by reason of the fact that the contract was entered into in the State of New York.

4. The law of New York governs, to the exclusion of the law of Vermont, the determination of the issue as to whether plaintiff can revoke his agreement to arbitrate, by reason of the agreement of the parties.

5. On May 3, 1954, defendant served on plaintiff a demand for arbitration of all the controversies between the parties which are the subject matter of this civil action; by reason of such service, and proceedings to be had pursuant thereto under the rules of the American Arbitration Association and the laws of the State of New York, said service will result in the appointment of arbitrators; de-

[fols. 18-20] termination by them of all of the controversies which are the subject matter of the civil action, and announcement of an award disposing of all such controversies. Said award when made and duly entered in a court of the State of New York will be a judgment entitled to full faith and credit, or if said award is offered as a defense in this civil action, it will dispose of all the issues in this civil action. A copy of said demand for arbitration is attached to this motion as an exhibit thereto.

Wherefore, the defandant prays this civil action and all proceedings therein be stayed pending appointment of arbitrators and determination by such arbitrators of the controversies which are the subject matter of this action.

AMERICAN ARBITRATION ASSOCIATION. DEMAND FOR ARBITRATION—(omitted in printing)

[fol. 21] IN UNITED STATES DISTRICT COURT

OPINION—July 8, 1954

GIBSON, J.

On February 15, 1954, the plaintiff, a citizen of Vermont, instituted this civil action for breach of an employment contract in the county court within and for the County of Bennington, Vermont. On March 5, 1954, the defendant, a corporate citizen of New York, petitioned for the removal of the county court action to this court under the provisions of 28 U.S.C.A. 1441 et seq. On March 10, 1954, the defendant filed its answer to the complaint, joining therewith a counterclaim against the defendant.

On May 6, 1954, the defendant moved for a stay of the proceedings in this court on the grounds that the employment contract here in issue contained a mandatory, irrevocable agreement providing for arbitration of any disputes which might arise out of the contract. The particular contractual provisions pertinent here are as follows:

"Eleventh: The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Asso[illegible]tion, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere."

"Fourteenth: The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance [fol. 22] with and under and pursuant to the laws of the State of New York and that in any action special proceeding or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted."

It is the defendant's contention that it is entitled to the stay it seeks on three independent grounds:

1. Under the authority of the Federal Arbitration Act, so-called, as set forth in 9 U. S. C. A.;

2. That the parties have validly contracted to adjust contractual disputes by arbitration;

3. That a Vermont court would, under like circumstances, stay the present action.

The cause was argued at Brattleboro, Vermont, on June 22, 1954, at which time the plaintiff petitioned for a temporary injunction to prevent the defendant from continuing the arbitration proceedings which it had instituted on or about May 3, 1954.

Conclusion of Law

It might well be said that all three of the defendant's contentions are centered in one issue, i.e.: what would a state court of this jurisdiction do were the instant motion before it? Passing over the questions of whether this employment contract is a contract evidencing a transaction involving commerce or if this is a suit or proceeding brought in a District Court of the United States, we must remember that a United States District Court is bound by the substantive law of the state within the boundaries of which it sits. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. In a case based solely on diversity of citizenship, the substantial result of litigation in a Federal Court should not differ from that in a state court. *Guaranty* [fol. 23] *Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079; *Angel* v. *Bullington*, 330 U. S. 183, 67 S. Ct. 650, 91 L. Ed. 832. It is therefore obvious that this Court must act upon the stay motion so as to reach the same legal result as would a state court of this jurisdiction.

There is no statutory law governing arbitration in Vermont; common law rules must, therefore, necessarily apply. The common law rule is that an agreement to submit an issue to arbitration is not binding and is revocable at any time before an award is actually made by arbitrators. *Mead's Admx.* v. *Owen*, 83 Vt. 132, 135; *Sartwell* v. *Sowles, et al.*, 72 Vt. 270, 277. This seems also to be the general rule to be applied in the absence of a controlling statute. *Shafer* v. *Metro-Goldwyn-Mayer Dist. Corp.*, 36 Ohio App. 31, 172 N.E. 689, 693; 6 C.J.S. Arbitration and Award 33(a).

In accordance with the law of Vermont, it is ordered that the defendant's motion for a stay of these proceedings be denied. The temporary injunction sought by the plaintiff is a matter addressed largely to the discretion of this Court. *Meccano, Ltd.* v. *John Wanamaker*, 253 U. S. 136, 40 S. Ct. 463, 64 L. Ed. 822. The requisite need for this injunction has not been shown convincingly and the petition therefor is denied. *National Commodities Co.* v. *Viret*, C.C.A. 2, 296 F. 664.

Let entry be made accordingly.

Ernest W. Gibson, U. S. District Judge.

Dated at Brattleboro, Vermont, this eighth day of July, 1954.

Endorsed: Filed July 9, 1954.

Arnold A. Murray, Deputy Clerk.

[fol. 24] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 28, 1954

Notice is hereby given that Polygraphic Company of America, Inc., defendant above named, hereby appeals to the United States Court of Appeals for the 2nd Circuit from an order of the United States District Court for the District of Vermont denying defendant's motion for a stay of proceedings entered in this action on July 9, 1954.

Dated at Burlington, Vermont this 27th day of July, 1954.

(S.) McNamara & Larrow, Guy Page, Jr., Attorneys for Defendant, Polygraphic Company of America, Inc., 209 College Street, Burlington, Vermont.

[File endorsement omitted]

[fol. 24a] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

DOCKET ENTRIES

I, A. Daniel Fusaro, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the docket entries in the above entitled case in this Court are as follows:

September 7, 1954. Filed tw. record (original papers of Dist. Ct.)
October 6, 1954. Filed 24 copies, appendix-appellant
October 6, 1954. Filed brief, appellant
October 27, 1954. Filed order extending time to Nov. 9, 1954
November 8, 1954. Filed brief, appellee
November 20, 1954. Filed brief, Appellant, reply
January 19, 1955. Order reversed, Frank, C.J.
January 19, 1955. Filed judgment
February 4, 1955. Filed bill of costs
February 4, 1955. Issued mandate

1954

March 4, 1955. Filed motion for temporary stay pending determination of motion to recall mandate, etc.

March 11, 1955. Filed motion papers (endorsed) & order recalling mandate and staying arbitration proceedings pending application for writ of certiorari

March 17, 1955. Received recalled mandate

April 11, 1955. Certified appendix & proceedings to EVC

April 18, 1955. Filed copy of notice of filing petition for certiorari

June 6, 1955. Filed certified copy of order of Supreme Court granting petition for certiorari

June 6, 1955. Reissued recalled mandate (inadvertently issued)

June 30, 1955. Received recalled mandate

Dated: July 25, 1955.

A. Daniel Fusaro, Clerk, United States Court of Appeals, Second Circuit. (Seal.)

[fol. 25] In United States Court of Appeals for the Second Circuit, October Term, 1954

No. 114

Argued December 14, 15, 1954.

Docket No. 23196

Norman C. Bernhardt, Appellee

v.

Polygraphic Company of America, Inc., Appellant

Before: Swan, Frank and Hincks, Circuit Judges.

Appeal from an order of the United States District Court for the District of Vermont, entered by Judge Gibson. Reversed.

Manfred W. Ehrich, Jr. and Eugene V. Clark, Bennington, Vermont, for appellee;

McNamara & Larrow, Guy M. Page and Guy M. Page, Jr., Burlington, Vermont, for appellant.

Defendant, a New York corporation, made a written agreement in New York with plaintiff, then a resident of that State. The agreement provided for the employment of plaintiff as the superintendent of defendant's lithograph plant in Vermont. It also provided:

> [fol. 26] "Subject to the general supervision and pursuant to the orders, advice and direction of the Employer, Employee shall have charge of and be responsible for the operation of said lithographic plant in North Bennington, shall perform such other duties as are customarily performed by one holding such position in other, same or similar businesses or enterprises as that engaged in by the Employer, and shall also additionally render such other and unrelated services and duties as may be assigned to him from time to time by Employer. . . .
>
> "Employer shall pay Employee and Employee agrees to accept from Employer, in full payment for Employee's services hereunder, compensation at the rate of $15,000.00 per annum, payable twice a month on the 15th and 1st days of each month during which this agreement shall be in force; the compensation for the period commencing August 1, 1952 through August 15, 1952 shall be payable on August 15, 1952. In addition to the foregoing, Employer agrees that it will reimburse Employee for any and all necessary, customary and usual expenses incurred by him while traveling for and on behalf of the Employer pursuant to Employer's directions. . . .
>
> "It is expressly understood and agreed that Employee shall not be entitled to any additional compensation by reason of any service which he may perform as a member of any managing committee of Employer, or in the event that he shall at any time be elected an officer or director of Employer. . . .
>
> "The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbi-

tration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere. . .

"The parties hereto do hereby stipulate and agree that it is their intention and covenant that this aggreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of New York and that in any action special proceeding or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be [fol. 27] applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted."

Plaintiff, having become a resident of Vermont, brought this action in the Vermont state court. His complaint set forth the agreement, alleged that defendant had wrongfully discharged plaintiff, and asked damages. Defendant, having removed the suit to the court below, filed its answer, including a counterclaim. Defendant then made a motion for a stay; it alleged that it had served on plaintiff a demand for arbitration, and played that plaintiff's suit be stayed "pending appointment of arbitrators and determination by such arbitrators of the controversies which are the subject matter of this action."

The district judge denied the stay on the ground that, under Vermont "law," an agreement to arbitrate "is not binding and is revocable at any time before an award is actually made by arbitrators," and that, under Erie R. Co.

v. Tompkins, 304 U. S. 64, and related cases, Vermont "law" controlled. Defendant appealed.

The Federal Arbitration Act, 9 U.S.C. Secs. 1, 2 and 3, reads as follows:

"Sec. 1. *Maritime transactions* and *commerce* defined; exceptions to operation of title:

> " 'Maritime transactions,' as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations; or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or foreign nation, but nothing herein contained shall apply to contracts of employment in of seamen rail- [fol. 28] road employees, or any other class of workers engaged in foreign or interstate commerce.

"Sec. 2. Validity, Irrevocability, and enforcement of agreements to arbitrate.

> " 'A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"Sec. 3. Stay of proceedings where issue therein referable to arbitration.

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit *suit* is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

[fol. 29] Frank, Circuit Judge:

1. We think that a stay, pursuant to Section 3 of the Federal Arbitration Act, 9 U. S. C. Sec. 3, is not "substantive" within the meaning of Erie R. Co. v. Tompkins, 304 U. S. 64, and Guaranty Trust Company v. York, 326 U. S. 99. We so held, per Judge Learned Hand, in Murray Oil Products Company v. Mitsui & Company, 146 F. (2d) 381, 383 (C. A. 2), where we said: "Arbitration is merely a form of trial, to be adopted in the action itself, in place of a trial at common law: it is like a reference to a master, or an 'advisory trial' under Federal Rules of Civil Procedure, Rule 39(c)."

2. Section 3 applies whether or not the agreement is of a kind covered by Sec. 2, i.e., for purposes of Sec. 3, the agreement need not involve a maritime transaction or interstate or foreign commerce. The power to enact Sec. 3 derives from Article III, Section 2 of the Constitution. See, e. g., Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 70 F. (2d) 297, 298 (C. A. 2) aff'd 293 U. S. 449; Agostini Bros. Bldg. Corp. v. United States, 142 F. (2d) 854 (C. A. 4).

3. Plaintiff argues that Section 3 deals with a suit "brought in any court of the United States" and therefore not with a removed suit. We cannot agree. Murray Oil Products Co. v. Mitsui & Co., supra, was a removed suit; see also Parry v. Bache, 125 F. (2d) 493, 495 (C. A. 5).

4. Section 1 of the Act provides that "nothing herein con-

tained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."[1] We need not in this [fols. 30-31] case decide whether this clause is restricted in its application to those sections of the Act relating to interstate and foreign commerce or whether it applies to all sections, including Section 3. For assuming, arguendo, that the second interpretation is correct, we think the clause irrelevant here. The words "any other class of workers," read in connection with the immediately preceding words, show an intention to exclude contracts of employment of a "class" of "workers" like "seamen" or "railroad employees."[2] Plaintiff was not hired as a "worker" but as a plant superintendent, at a salary of $15,000 a year, with managerial duties fundamentally different from those of "workers."[3]

The California arbitration statute excludes from its scope

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[1] For a variety of conclusions as to the meaning and application of this clause, see, e. g., Donahue v. Susquehanna Collieries Co., 138 F. (2d) 3 (C. A. 3); Watkins v. Hudson Coal Co., 151 F. (2d) 311 (C. A. 3); Amalgamated Association v. Greyhound Lines, 192 F. (2d) 310 (C. A. 3); Pennsylvania Greyhound Lines v. Amalgamated Association, 193 F. (2d) 327 (C. A. 3); Tenney Engineering Co. v. United Electrical R. & M. Workers, 207 F. (2d) 450 (C. A. 3); Shirley-Herman Co., Inc. v. International Hod-Carriers, 182 F. (2d) 806, 809 (C. A. 2); Agostini Bros. Building Corp. v. United States, 142 F. (2d) 854 (C. A. 4); International Union v. Colonial Hardware Flooring Co., 168 F. (2d) 33 (C. A. 4); Gatliff Coal Co. v. Cox, 142 F. (2d) 876 (C. A. 6); Lewittes & Sons v. United Furniture Workers, 95 F. Supp. 851 (D. C., S. D. N. Y.); Ludlow Mfg. & Sales Co. v. Textile Workers Union, 108 F. Supp. 45 (D. C. Del.).

[2] See discussion of the background of this clause in Tenney Engineering Co. v. United Electrical R. & M. Workers, 207 F. (2d) 450, 452-453 (C. A. 3).

[3] Note, inter alia, the provision contemplating that plaintiff might perform services "as a member of the management committee" and might be "elected an officer or director."

"contracts pertaining to labor." The California courts have held that this exclusion does not cover a contract with a sales manager, hired at a salary of $100 per week; Kerr v. Nelson, 59 Pac. (2d) 821; or one with a motion-picture actor to be paid $1,000 per week; Universal Pictures Corp. v. Superior Court, 50 Pac. (2d) 500. See also Levy v. Superior Court, 104 Pac. (2d) 770, 773. We think these decisions most persuasive.

Reversed.

[fol. 32] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NORMAN C. BERNHARDT, Plaintiff-Appellee,

v.

POLYGRAPHIC CO. OF AMERICA, INC., Defendant-Appellant

JUDGMENT—January 19, 1955

Appeal from the United States District Court for the District of Vermont

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel:

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this Court; with costs to the appellant.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. Daniel Fusaro, Clerk.

[fols. 33-54] [File endorsment omitted.]

[fols. 55-56] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 731

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed May 31, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
APR 18 1955
HAROLD B. WILLEY, Clerk

No. ~~731~~ 49

IN THE

Supreme Court of the United States

NORMAN C. BERNHARDT,
Petitioner,

v.

POLYGRAPHIC COMPANY OF AMERICA, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MANFRED W. EHRICH, JR.,
EUGENE V. CLARK,
100 South Street,
Bennington, Vermont,
Counsel for Petitioner.

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UNITED STATES ARBITRATION ACT OF FEBRUARY 12, 1925, C. 213, Secs. 1, 2 & 3, 43 Stat. 883 as amended by UNITED STATES ARBITRATION ACT OF JULY 30, 1947, C. 392, Sec. 1, 61 Stat. 669
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. ________

NORMAN C. BERNHARDT

Petitioner,

v.

POLYGRAPHIC COMPANY OF AMERICA, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the district court has not yet been reported. It is set forth in the appendix, *infra* page 1 A. The opinion of the circuit court of appeals has not yet been reported. It is set forth in the appendix, *infra* page 5 A.

Jurisdiction

The mandate reversing the order of the district court with costs to the appellant was entered February 4, 1955. On March 11, 1955, on motion of the petitioner, the mandate was recalled by the circuit court and arbitration proceedings were stayed pending petitioner's application to the Supreme Court for certiorari.

The jurisdiction of this court is invoked under 28 U. S. C. 1254.

Questions Presented

1. Whether or not Section 3 of the Federal Arbitration Act (Title 9, United States Code), which provides for a stay of the trial of an action pending arbitration, may be invoked to enforce arbitration of questions arising out of a contract of employment calling for performance solely within Vermont, a non-enforcing state, where the case has been removed from a Vermont state court to the federal district court solely upon the diversity of citizenship of the parties.

2. Whether or not the doctrine of the case of *Erie RR. Co. v. Harry J. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 (1938), required the federal court in this situation to apply local Vermont law which denies the enforceability of arbitration agreements.

Statutes Involved

This case involves the consideration of Sections 1, 2 and 3 of Title 9 of the United States Code, known as the UNITED STATES ARBITRATION ACT OF JULY 30, 1947, C. 392 Sec. 1, 61 Stat. 669, which are set forth in the appendix, *infra* page 11 A.

Statement of the Case

The case at bar involves the breach of a contract of employment dated July 19, 1952, whereby the respondent engaged the petitioner to be superintendent at its plant in North Bennington, Vermont, for a term of three years and subsequently discharged him, without cause, as he claims, on October 22, 1953, when the contract had nearly two years to run.

The contract contained an arbitration clause which read as follows:

> "*Eleventh:* The parties hereto do agree that any difference, claim or matter in dispute arising between

> them out of this agreement or connected herewith shall be submitted by them for arbitration by the American Arbitration Association, or its successor, and that the determination of said American Arbitration Association or its successor, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere."

After his discharge, petitioner brought suit in Vermont and the case was removed from the Bennington County Court to the United States District Court for the District of Vermont by respondent's petition alleging diversity of citizenship of the parties as the sole ground for jurisdiction of the federal court.

After removal to the district court, the respondent sought by motion to have the legal proceedings stayed pending arbitration, relying on Section 3 of the Federal Arbitration Act (Title 9 of the United States Code).

The motion was denied by the District Court for the District of Vermont, which under the doctrine of *Erie RR. Co.* v. *Harry J. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 (1938), applied the Vermont Law which denies enforceability of arbitration agreements (App. page 7 A).

Respondent then appealed to the United States Circuit Court of Appeals for the Second Circuit where the district court's decision was reversed and a mandate issued staying proceedings under the authority of Section 3 of the Federal Arbitration Act (9 U. S. Code, Sec. 3), the circuit court holding that this case does not fall within the doctrine of *Erie* v. *Tompkins, supra* (App. page 9 A).

On motion of the petitioner the mandate was recalled by the circuit court and arbitration proceedings were stayed pending petitioner's application to the Supreme Court for certiorari.

Reasons for Granting the Writ

1. *The decision of the circuit court of appeals in the case at bar conflicts with decisions in other circuit courts of appeals.*

a) In *Gatliff Coal Co.* v. *Cox*, 142 F. 2d. 876 (1944), the 6th Circuit Court of Appeals held in a diversity case that the question of the enforceability of arbitration agreements is governed not by Section 3 of the United States Arbitration Act but by law of the state of the forum, namely Kentucky, which does not recognize the enforceability of arbitration agreements.

b) In *Tejas Development Co.* v. *McGough Bros.*, 165 F. 2d. 276 (1947), the 5th Circuit, in a diversity case, held that the Federal Arbitration Act did not govern the case, and applied the local law of Texas, a non-enforcing state, in holding invalid an award of arbitrators made after one of the parties had refused to take part in the arbitration proceedings.

2. *The decision in the case at bar in the circuit court is in direct conflict with the law and policy of the State of Vermont, and of all other nonenforcing jurisdictions.*

In the case at bar the jurisdiction of the federal courts is grounded solely on diversity, and "The essence of diversity jurisdiction is that a federal court enforces State law and State policy", *Angel* v. *Bullington*, 330 U. S. 183, 191, 91 L. Ed. 832, 838 (1947).

Under Vermont law an agreement to arbitrate is revocable at any time before an award is actually made by the arbitrators. *Mead's Administratrix* v. *Owen*, 83 Vt. 132, 135 (1910); *Sartwell* v. *Sowles et al*, 72 Vt. 270 (1900).

In Vermont the course of litigation is not "tortuous" as it is in New York and is in fact more economical than arbitration, and the policy of the state is to guaranty to its litigants the right to a trial under established judicial rules and before a jury. Some twelve states including New York and Pennsylvania have arbitration acts similar to the Federal Arbitration Act (see Kochery, *The Enforcement of Arbitration Agreements in the Federal Courts: Erie* v. *Tompkins*, 39 Cornell Law Quarterly 74, (note 7 at page 76). However, a majority of States, including Vermont, have not found it necessary to provide this nonjudicial mode of settling disputes so as to relieve the courts of pressure of business.

The decision of the circuit court would deprive an unwilling party of the right to a trial of this action by a court and jury, as otherwise guaranteed him by Vermont Law, merely because of the accident of the diversity of citizenship of the parties.

3. *The circuit court in the case at bar has decided a federal question in a way that conflicts with applicable decisions in this court.*

a) The circuit court decided that "a stay pursuant to Section 3 of the Federal Arbitration Act, 9 U. S. C. Sec. 3, is not 'substantive' within the meaning of *Erie RR. Co.* v. *Tompkins*, 304 U. S. 64, and *Guaranty Trust Company* v. *York*, 326 U. S. 99."

Yet, in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 89 L. Ed. 2079 (1945), this court held that

> "In essence, the intent of that (*Erie* v. *Tompkins*) decision was to insure that, in all cases where a Federal Court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the Federal Court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court. The nub of the policy that underlies *Erie RR. Co.* v. *Tompkins* is that for the same trans-

> action the accident of a suit by a nonresident litigant in a Federal Court instead of in a State Court a block away should not lead to a substantially different result. * * *" (page 111)

and in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 555, 93 L. Ed. 1528, 1541 (1949) this court held that

> "But *Erie RR. Co.* v. *Tompkins* and its progeny have wrought a more far-reaching change in the relation of state and federal courts and the application of state law in the latter whereby in diversity cases the federal court administers the state system of law in all except details relating to its own conduct of business."

In *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 538, 93 L. Ed. 1524, 1527, this court held as in *Guaranty Trust Co.* v. *York, supra* that in diversity cases the federal court sits merely as another court of the state (citing *Erie* v. *Tompkins* and *Angel* v. *Bullington, supra*) and that

> "the York case was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case".

See also *Angel* v. *Bullington*, quoted *supra*, and *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, 93 L. Ed. 1520 (1949).

b) The circuit court in the case at bar relies heavily on the statement in *Murray Oil Co.* v. *Mitsui & Co.*, 146 F. 2d. 381, 383, (CCA 2, 1944) that

> "Arbitration is merely a form of trial, to be adopted in the action itself, * * *". (App. page 9 A)

This, it will be noted, is the very argument put forward by the unsuccessful respondent in this court in *Wilko* v. *Swan*, 346 U. S. 427, 98 L. Ed. 114 (1953).

Wilko v. *Swan* (*supra*) on a careful analysis is very similar to the case at bar; the U. S. Supreme Court held that an arbitration clause in a margin agreement was unenforceable because the Securities Act, Sec. 14, declared void any condition, stipulation or provision binding a buyer to waive, among other things, a trial in the State or Federal Courts of any right he might have to recover against a seller, reasoning that:

> "As their award may be made without explanation of their reasons and without a complete record of their proceedings the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof', 'reasonable care' or 'material fact' * * * cannot be examined. Power to vacate an award (under the Federal Arbitration Act, Sec. 10) is limited.
>
> "* * * In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." (pages 436-437)

4. *The court of appeals has decided an important question of federal law which has not been but should be settled by this court.*

a) The case of *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 70 F. 2d. 297 (CCA 2, 1934) Aff'd 293 U. S. 449, (1935) cited in paragraph 2 of the opinion of the circuit court of appeals (App. page 9 A) in this case, is the leading case supposed to support the proposition that Section 3 of the Federal Arbitration Act is not limited in its application to contracts involving maritime transactions or interstate or foreign commerce.

The *Shanferoke Case* was decided before *Erie* v. *Tompkins* had overruled the venerable case of *Swift* v. *Tyson*, 16 Pet. 1, 10 L. Ed. 865 (1842).

It should be noted that the statements of the Circuit court in the *Shanferoke* case were dicta as to the applicability of Section 3, for it specifically points out that "It is not necessary, however, to decide the point here, because the contract involved commerce as defined in Section 1" (page 299).

Shanferoke v. *Westchester* may have been good law when it was decided, but if the circuit court or the Supreme Court intended to say, as we do not concede they did, that in diversity cases only the Federal Rule of remedy should be applied to the exclusion of conflicting local state rules, it seems clear that any such holding was overruled in *Erie* v. *Tompkins, supra,* three years later. It is petitioner's contention that in the light of the *Erie* v. *Tompkins* decision the Federal Arbitration Act is necessarily limited in its application to cases involving Federal jurisdiction based on grounds other than diversity of citizenship. *Tejas* v. *McGough, supra,* so holds and is the only case in the circuit courts on this question which specifically mentions the *Erie* case.

b) In the three remaining cases relied upon by Judge Frank in his opinion in the circuit court below, (App. page 9 A) jurisdiction of the federal court was based on grounds other than diversity of citizenship of the parties:

Murray Oil Products Company v. *Mitsui & Company,* 146 F. 2d. 381 (CCA 2, 1944) involved a transaction in foreign commerce resulting in an action begun in a court of the State of New York. It should be noted that New York is a state which enforces arbitration agreements; consequently there was no conflict between Federal and local law.

Agostini Bros. Bldg. Corp. v. *United States,* 142 F. 2d. 854 (CCA 4, 1944) involved an action under the Miller Act relating to public building contracts.

In *Parry* v. *Bache,* 125 F. 2d. 493 (CCA 5, 1942), the court stated that because the case clearly involved interstate commerce it was unnecessary to decide whether the "stay" section (s.3) of the act is broader than the preceding sections.

It is submitted that none of these cases is authority for Judge Frank's proposition "that a stay, pursuant to Section 3 . . . is not 'substantive' within the meaning of *Erie RR. Co.* v. *Tompkins* . . .," and indeed, none of them mention the *Erie* case.

c) The questions petitioner seeks to have reviewed here have been made the subject of two recent law review articles, both of which recognize that the questions have not yet been settled by this court: *The Enforcement of Arbitration Agreements in the Federal Courts: Erie* v. *Tompkins* by David R. Kochery, 39 Cornell Law Quarterly 74. Cf. Sturges and Murphy; *Some Confusing Matters Relating to Arbitration under the United States Arbitration Act*, 17 Law and Contemporary Problems 580, 590.

Conclusion

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

Manfred W. Ehrich, Jr.
Eugene V. Clark
100 South Street
Bennington, Vermont
Counsel for Petitioner

Opinion.

UNITED STATES DISTRICT COURT

For the District of Vermont

Civil Action No. 1599.

Norman C. Bernhardt

v.

Polygraphic Company of America, Inc.

Gibson, J.

On February 15, 1954, the plaintiff, a citizen of Vermont, instituted this civil action for breach of an employment contract in the county court within and for the County of Bennington, Vermont. On March 5, 1954, the defendant, a corporate citizen of New York, petitioned for the removal of the county court action to this court under the provisions of 28 U. S. C. A. 1441 et seq. On March 10, 1954, the defendant filed its answer to the complaint, joining therewith a counterclaim against the defendant.

On May 6, 1954, the defendant moved for a stay of the proceedings in this court on the grounds that the employment contract here in issue contained a mandatory, irrevocable agreement providing for arbitration of any disputes which might arise out of the contract. The particular contractual provisions pertinent here are as follows:

> "Eleventh: The parties hereto do agree that any differences, claim, or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American

Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere."

"FOURTEENTH: The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of New York and that in any action, special proceeding or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted."

It is the defendant's contention that it is entitled to the stay it seeks on three independent grounds:

1. Under the authority of the Federal Arbitration Act, so-called, as set forth in 9 U. S. C. A.;

2. That the parties have validly contracted to adjust contractual disputes by arbitration;

3. That a Vermont court would, under like circumstances, stay the present action.

The cause was argued at Brattleboro, Vermont, on June 22, 1954, at which time the plaintiff petitioned for a temporary injunction to prevent the defendant from continuing the arbitration proceedings which it had instituted on or about May 3, 1954.

Opinion

CONCLUSION OF LAW

It might well be said that all three of the defendant's contentions are centered in one issue, i.e.: what would a state court of this jurisdiction do were the instant motion before it? Passing over the questions of whether this employment contract is a contract evidencing a transaction involving commerce or if this is a suit or proceeding brought in a District Court of the United States, we must remember that a United States District Court is bound by the substantive law of the state within the boundaries of which it sits. *Erie RR. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. In a case based solely on diversity of citizenship, the substantial result of litigation in a Federal Court should not differ from that in a state court. *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079; *Angel* v. *Bullington*, 330 U. S. 183, 67 S. Ct. 650, 91 L. Ed. 832. It is therefore obvious that this Court must act upon the stay motion so as to reach the same legal result as would a state court of this jurisdiction.

There is no statutory law governing arbitration in Vermont; common law rules must, therefore, necessarily apply. The common law rule is that an agreement to submit an issue to arbitration is not binding and is revocable at any time before an award is actually made by arbitrators. *Mead's Admx.* v. *Owen*, 83 Vt. 132, 135; *Sartwell* v. *Sowles, et al.*, 72 Vt. 270, 277. This seems also to be the general rule to be applied in the absence of a controlling statute. *Shafer* v. *Metro-Goldwyn-Mayer Dist. Corp.*, 36 Ohio App. 31, 172 N. E. 689, 693; 6 C. J. S. Arbitration and Award 33(a).

In accordance with the law of Vermont, it is ordered that the defendant's motion for a stay of these proceedings be denied. The temporary injunction sought by the plaintiff is a matter addressed largely to the discretion of this Court. *Meccano, Ltd.* v. *John Wanamaker*, 253 U. S. 136, 40 S. Ct.

463, 64 L. Ed. 822. The requisite need for this injunction has not been shown convincingly and the petition therefor is denied. *National Commodities Co.* v. *Viret,* C. C. A. 2, 296 F. 664.

Let entry be made accordingly.

Ernest W. Gibson
Ernest W. Gibson
U. S. District Judge

Dated at Brattleboro, Vermont, this eighth day of July, 1954.

Endorsed: Filed July 9, 1954,

Arnold A. Murray
Deputy Clerk.

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 114 October Term, 1954

Argued December 14, 15, 1954
Decided January 19, 1955

Docket No. 23196

NORMAN C. BERNHARDT,
Appellee,

v.

POLYGRAPHIC COMPANY OF AMERICA, INC.,
Appellant.

Before: Swan, Frank and Hincks, Circuit Judges.

Appeal from an order of the United States District Court for the District of Vermont, entered by Judge Gibson. Reversed.

MANFRED W. EHRICH, JR. and EUGENE V. CLARK, Bennington, Vermont, for appellee;

MCNAMARA & LARROW, GUY M. PAGE and GUY M. PAGE, JR., Burlington, Vermont, for appellant.

Defendant, a New York corporation, made a written agreement in New York with plaintiff, then a resident of that State. The agreement provided for the employment of plaintiff as the superintendent of defendant's lithograph plant in Vermont. It also provided:

> "Subject to the general supervision and pursuant to the orders, advice and direction of the Employer,

Employee shall have charge of and be responsible for the operation of said lithographic plant in North Bennington, shall perform such other duties as are customarily performed by one holding such position in other, same or similar businesses or enterprises as that engaged in by the Employer, and shall also additionally render such other and unrelated services and duties as may be assigned to him from time to time by Employer. . . .

"Employer shall pay Employee and Employee agrees to accept from Employer, in full payment for Employee's services hereunder, compensation at the rate of $15,000.00 per annum, payable twice a month on the 15th and 1st days of each month during which this agreement shall be in force; the compensation for the period commencing August 1, 1952 through August 15, 1952 shall be payable on August 15, 1952. In addition to the foregoing, Employer agrees that it will reimburse Employee for any and all necessary, customary and usual expenses incurred by him while traveling for and on behalf of the Employer pursuant to Employer's direction. . . .

"It is expressly understood and agreed that Employee shall not be entitled to any additional compensation by reason of any service which he may perform as a member of any managing committee of Employer, or in the event that he shall at any time be elected an officer or director of Employer. . . .

"The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to

> arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere. . . .
>
> "The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of New York and that in any action, special proceeding or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted."

Plaintiff, having become a resident of Vermont, brought this action in the Vermont state court. His complaint set forth the agreement, alleged that defendant had wrongfully discharged plaintiff, and asked damages. Defendant, having removed the suit to the court below, filed its answer, including a counterclaim. Defendant then made a motion for a stay; it alleged that it had served on plaintiff a demand for arbitration, and prayed that plaintiff's suit be stayed "pending appointment of arbitrators and determination by such arbitrators of the controversies which are the subject matter of this action."

The district judge denied the stay on the ground that, under Vermont "law," an agreement to arbitrate "is not binding and is revocable at any time before an award is actually made by arbitrators," and that, under *Erie RR. Co. v. Tompkins*, 304 U. S. 64, and related cases, Vermont "law" controlled. Defendant appealed.

The Federal Arbitration Act, 9 U. S. C. Secs. 1, 2 and 3, reads as follows:

"Sec. 1. *Maritime transactions* and *commerce* defined; exceptions to operation of title:

> "'Maritime transactions,' as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations; or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or foreign nation, but nothing herein contained shall apply to contracts of employment in of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

"Sec. 2. Validity, Irrevocability, and enforcement of agreements to arbitrate.

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"Sec. 3. Stay of proceedings where issue therein referable to arbitration.

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one

> of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Frank, Circuit Judge:

1. We think that a stay, pursuant to Section 3 of the Federal Arbitration Act, 9 U. S. C. Sec. 3, is not "substantive" within the meaning of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and *Guaranty Trust Company* v. *York*, 326 U. S. 99. We so held, per Judge Learned Hand, in *Murray Oil Products Company* v. *Mitsui & Company*, 146 F. (2d) 381, 383 (C. A. 2), where we said: "Arbitration is merely a form of trial, to be adopted in the action itself, in place of a trial at common law: it is like a reference to a master, or an 'advisory trial' under Federal Rules of Civil Procedure, Rule 39(c):"

2. Section 3 applies whether or not the agreement is of a kind covered by Sec. 2, i.e., for purposes of Sec. 3, the agreement need not involve a maritime transaction or interstate or foreign commerce. The power to enact Sec. 3 derives from Article III, Section 2 of the Constitution. See, e.g., *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 70 F. (2d) 297, 298 (C. A. 2) aff'd. 293 U. S. 449; *Agostini Bros. Bldg. Corp.* v. *United States*, 142 F. (2d) 854 (C. A. 4).

3. Plaintiff argues that Section 3 deals with a suit "brought in any court of the United States" and therefore not with a removed suit. We cannot agree. *Murray Oil Products Co.* v. *Mitsui & Co.*, *supra*, was a removed suit; see also *Parry* v. *Bache*, 125 F. (2d) 493, 495 (C. A. 5).

4. Section 1 of the Act provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged

in foreign or interstate commerce."[1] We need not in this case decide whether this clause is restricted in its application to those sections of the Act relating to interstate and foreign commerce or whether it applies to all sections, including Section 3. For assuming, arguendo, that the second interpretation is correct, we think the clause irrelevant here. The words "any other class of workers," read in connection with the immediately preceding words, show an intention to exclude contracts of employment of a "class" of "workers" like "seamen" or "railroad employees."[2] Plaintiff was not hired as a "worker" but as a plant superintendent, at a salary of $15,000 a year, with managerial duties fundamentally different from those of "workers."[3]

The California arbitration statute excludes from its scope "contracts pertaining to labor." The California courts have held that this exclusion does not cover a contract with a sales manager, hired at a salary of $100 per week; *Kerr* v. *Nelson*, 59 Pac. (2d) 821; or one with a motion-picture actor to be paid $1,000 per week; *Universal Pictures Corp.* v. *Superior Court*, 50 Pac. (2d) 500. See also *Levy* v. *Superior Court*, 104 Pac. (2d) 770, 773. We think these decisions most persuasive.

---

[1] For a variety of conclusions as to the meaning and application of this clause, see, e.g., *Donahue* v. *Susquehanna Collieries Co.*, 138 F. (2d) 3 (C. A. 3); *Watkins* v. *Hudson Coal Co.*, 151 F. (2d) 311 (C. A. 3); *Amalgamated Association* v. *Greyhound Lines*, 192 F. (2d) 310 (C. A. 3); *Pennsylvania Greyhound Lines* v. *Amalgamated Association*, 193 F. (2d) 327 (C. A. 3); *Tenney Engineering Co.* v. *United Electrical R. & M. Workers*, 207 F. (2d) 450 (C. A. 3); *Shirley-Herman Co., Inc.* v. *International Hod-Carriers*, 182 F. (2d) 806, 809 (C. A. 2); *Agostini Bros. Building Corp.* v. *United States*, 142 F. (2d) 854 (C. A. 4); *International Union* v. *Colonial Hardware Flooring Co.*, 168 F. (2d) 33 (C. A. 4); *Gatliff Coal Co.* v. *Cox*, 142 F. (2d) 876 (C. A. 6); *Lewittes & Sons* v. *United Furniture Workers*, 95 F. Supp. 851 (D. C., S. D. N. Y.); *Ludlow Mfg. & Sales Co.* v. *Textile Workers Union*, 108 F. Supp. 45 (D. C. Del.).

[2] See discussion of the background of this clause in *Tenney Engineering Co.* v. *United Electrical R. & M. Workers*, 207 F. (2d) 450, 452-453 (C. A. 3).

[3] Note, inter alia, the provision contemplating that plaintiff might perform services "as a member of the management committee" and might be "elected an officer or director."

Reversed.

Statutes

United States Arbitration Act of February 12, 1925, C. 213, Secs. 1, 2, & 3, 43 Stat. 883 as amended by United States Arbitration Act of July 30, 1947, C. 392, Sec. 1, 61 Stat. 669.

"Sec 1. *Maritime transactions* and *commerce* defined; exceptions to operation of title:

> "'Maritime transactions,' as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations; or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or foreign nation, but nothing herein contained shall apply to contracts of employment in of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

"Sec. 2. Validity, Irrevocability, and enforcement of agreements to arbitrate.

Statutes

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"Sec. 3. Stay of proceedings where issue therein referable to arbitration.

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Office - Supreme Court, U. S.
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SEP 21 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 49

NORMAN C. BERNHARDT,
Petitioner,

vs.

POLYGRAPHIC COMPANY OF AMERICA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

MANFRED W. EHRICH, JR.,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 49

NORMAN C. BERNHARDT,
Petitioner,
vs.
POLYGRAPHIC COMPANY OF AMERICA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the district court is reported in 122 Fed. Supp. 733 (R. 15). The opinion of the circuit court of appeals is reported in 218 Fed. 2d. 948 (R. 19).[1]

Jurisdiction

The mandate reversing the order of the district court with costs to the appellant was entered February 4, 1955. On March 11, 1955, on motion of the petitioner, the mandate was recalled by the circuit court and arbitration proceedings were stayed pending petitioner's application to the Supreme Court for certiorari. The petition for a writ of certiorari was filed on April 16, 1955, and granted May 31, 1955.

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[1] The Court of Appeals decision is discussed in a note in 41 Virginia Law Review, at page 379.

The jurisdiction of this court is invoked under 28 U.S.C. 1254.

Questions Presented

1. Whether or not Section 3 of the Federal Arbitration Act (Title 9, United States Code), which provides for a stay of the trial of an action pending arbitration, may be invoked to enforce arbitration of questions arising out of a contract of employment calling for performance solely within Vermont, a non-enforcing state, where the case has been removed from a Vermont state court to the federal district court solely upon the ground of diversity of citizenship of the parties.

2. Whether or not the doctrine of the case of *Erie R.R. Co.* v. *Harry J. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 (1938), required the federal court in this situation to apply local Vermont law which denies the enforceability of arbitration agreements.

Statutes Involved

United States Arbitration Act of February 12, 1925, C. 213, Secs. 1, 2, & 3, 43 Stat. 833 as amended by United States Arbitration Act of July 30, 1947, C. 392, Sec. 1, 61 Stat. 669, 9 U. S. C. Secs. 1-3:

"Sec. 1. *Maritime transactions* and *commerce* defined; exceptions to operation of title:

> " 'Maritime transactions,' as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or

any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations; or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

"Sec. 2. Validity, irrevocability, and enforcement of agreements to arbitrate:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"Sec. 3. Stay of proceedings where issue therein referable to arbitration:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Statement of the Case

The case at bar involves the breach of a contract of employment dated July 19, 1952, whereby the respondent engaged the petitioner to be superintendent at its plant in North Bennington, Vermont, for a term of three years and subsequently discharged him, without cause, as he claims, on October 22, 1953, when the contract had nearly two years to run.

The contract contained an arbitration clause which read as follows:

> "*Eleventh:* The parties hereto do agree that any difference, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them for arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successor, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere." (R. 7-8)

After his discharge, petitioner brought suit in Vermont, and the case was removed from the Bennington County Court to the United States District Court for the District of Vermont by respondent's petition alleging diversity of citizenship of the parties as the sole ground for jurisdiction of the federal court (R. 1).

After removal to the district court, the respondent sought by motion to have the legal proceedings stayed pending arbitration, relying on Section 3 of the Federal Arbitration Act (Title 9 of the United States Code) (R. 13).

The motion was denied by the District Court for the District of Vermont, which under the doctrine of *Erie R. R. Co.* v. *Harry J. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 (1938), applied the Vermont Law which denies enforceability of arbitration agreements (R. 15-17).

Respondent then appealed to the United States Circuit Court of Appeals for the Second Circuit where the District Court's decision was reversed and a mandate issued staying proceedings under the authority of Section 3 of the Federal Arbitration Act (9 U. S. Code, Sec. 3); the circuit court holding that this case does not fall within the doctrine of *Erie* v. *Tompkins, supra* (R. 19-25).

On motion of the petitioner the mandate was recalled by the circuit court and arbitration proceedings were stayed pending petitioner's application to the Supreme Court for certiorari (original record page 53; omitted from printed record).

Specifications of Error

The Court of Appeals erred:

1. In holding that the stay involved in this cause of action is not "substantive" within the meaning of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, and *Guaranty Trust Co.* v. *York*, 326 U. S. p. 99, 89 L. Ed. 2079 (1945).

2. In holding that the provisions of Section 3 of the Federal Arbitration Act are not limited to arbitration agreements in contracts of the kind covered by Section 2 of the Act.

3. In misconstruing the Appellee's position as to the inapplicability of the Act to this arbitration contract.

4. In refusing to apply Vermont Law and Vermont Policy in deciding the question of whether or not an unwilling party will be forced to arbitrate matters arising out of the breach of a contract which was by its terms to be per-

formed wholly in Vermont, in an action removed from the Vermont court solely on the ground of diversity of citizenship of the parties.

ARGUMENT

I. Under Vermont law, as under the common law generally, arbitration agreements are unenforceable.

> "It is true that mutual promises of submission to arbitration offered sufficient consideration to bind the parties. . . . But either party may revoke the submission at any time before the publication of an award * * *. A revoked submission is no bar to a suit for damages on the claim submitted * * *. It follows that when a suit is brought the rights of the parties are to be determined by the rules applicable to that proceeding, regardless of what may have been done under the submission."
>
> *Mead's Administratrix* v. *Owen*, 83 Vt. 132, 135 (1910).

See also

Sartwell v. *Sowles*, 72 Vt. 270 (1900);
Welch v. *Miller*, 70 Vt. 108 (1897);
Marsh v. *Packer*, 20 Vt. 198 (1848);
Aspinwall v. *Tousey*, 2 Tyler 328 (1803);
Hathaway v. *Strong, Porter & Co.*, 2 Tyler 105 (1802).

This accords with the common law as enforced generally, including the common law of New York prior to the passage of its arbitration statute.[2]

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[2] Some jurisdictions, notable among them New York and Pennsylvania, have deemed it expedient in resolving congestion in their courts to adopt legislation making arbitration agreements enforceable. But earlier, when Pennsylvania had such legislation and New York did not, the New York Court of Appeals refused to apply Pennsylvania law to a contract providing for performance wholly

(Footnote continued on next page)

6 *Williston on Contracts*, 5360 Section 1919 (Revised Edition);
Restatement of Contracts, Section 550, *Bargain for Arbitration;*
Meachem v. *Jamestown, etc.*, New York 211 N. Y. 346 (1914).

None of the Vermont cases deals with agreements to arbitrate future disputes. But the argument applies with double force to such executory agreements, for although contracts to submit existing disputes, are unenforceable, they are valid to the extent that their breach gives rise to a cause of action for nominal damages, whereas the common

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in Pennsylvania, holding in *Meachem* v. *Jamestown, etc. Ry.*, 211 New York 346 (1914) with an able concurring opinion by Judge Cardozo, that because arbitration is a matter of remedy the law of the State of the forum governs its enforceability. This rule of law has been universally followed since, and it should be followed here where Vermont with its sparse population and uncrowded court dockets has no such legislation but follows the common law rule that arbitration agreements, especially agreements to arbitrate future disputes, are not enforceable against a party to the agreement who chooses to litigate rather than arbitrate.

In Beale's treatise on *The Conflict of Laws* (1935 Ed.) he states in Section 347.5, pages 1245-6 "Enforcement of Arbitration Agreements", that "American courts, without exception, hold that arbitration agreements pertain to remedy or procedure. Consequently, the law of the forum determines their enforceability regardless of the place where the contract containing an arbitration provision was made, or was to be performed, or the law intended by the parties to govern" (citing many authorities)

and further (at page 1247) that

"If the arbitration agreement provides *specifically* that the arbitration is to be held in a state other than the forum, *lex fori* governs nevertheless. Thus, if the arbitration provided for is to be held in an enforcing state and the forum is a non-enforcing one, the arbitration provision will nonetheless be disregarded." citing *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S. D. N. Y. 1915); *The Eros*, 241 Fed. 186 (S. D. N. Y. 1916), aff'd 251 Fed. 45 (CCA 2, 1918). See also *Shaeffer* v. *Metro Goldwyn Mayer*, 36 Oh. App. 31, 172 N. E. 689 (1930).

law declares that agreements to arbitrate future disputes are completely invalid.

> *3 American Jurisprudence 854, 855, Arbitration and Award,* Section 27.

Petitioner's position in regard to the Vermont law has been conceded by the respondent both in the circuit court and in the district court below.

II. The accident of a suit by a non-resident litigant in a Federal Court instead of in a State Court should not lead to a substantially different result.

A. The rule of the cases of *Erie R. R. Co.* v. *Harry J. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188 (1938), and *Guaranty Trust Company* v. *York,* 326 U. S. 99, 109, 89 L. Ed. 2079, 2086 (1945) is well stated the latter case to be that "in all cases where a Federal Court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court. The nub of the policy that underlies *Erie R. R. Co.* v. *Tompkins,* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State Court a block away should not lead to a substantially different result."

This appears to be a clear and direct statement of what is now meant by the principle of uniformity of decision.

This Court in *Erie* v. *Tompkins (supra)* held that judicial decisions are laws of the states within the meaning of the Rules of Decision Act.[3]

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[3] ". . . the purpose of (sec. 34 of the Judiciary Act) was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship case would apply as their rules of decision the law of the State, unwritten as well as written." *Erie Railroad Co.* v. *Harry J. Tompkins,* 304 U. S. 64, 72, 73; 82 L. Ed. 1188, 1191.)

Ever since that decision, which overruled *Swift* v. *Tyson*, 16 Pet. 1, 10 L. Ed. 865 (1842), the Federal Courts have held as a matter of law that where no federal question was involved, and the parties were before a Federal Court solely because of the diversity of citizenship of the parties, the Federal District Court was bound to apply the law of the State within whose boundaries it sat, whether such local law was statutory or common law.

Thus in *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832, pp. 191, 192 (1947) it was held that

> "The essence of diversity jurisdiction is that a federal court enforces State law and State policy * * *. A federal court of North Carolina, when invoked on grounds of diversity of citizenship, cannot give what North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens."

As a result the cases following it have established the rule that "in diversity cases the federal court administers the state system of law in all except details relating to its own conduct of business." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 555, 93 L. Ed. 1528, 1541 (1949).

In *Guaranty Trust Co.* v. *York (supra)*, this court, per Mr. Justice Frankfurter in discussing the theory behind the *Erie* v. *Tompkins* rule, held (at pages 108, 109, 111 and 112) that:

> "When, because the plaintiff happens to be a nonresident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary, because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, *it cannot afford recovery if the right to recover is made unavailable*

> *by the State nor can it substantially affect the enforcement of the right as given by the State* * * * (pages 108-109) (emphasis added).
>
> " . . . Erie R. R. Co. *v.* Tompkins was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court: The nub of the policy that underlies Erie R. R. Co. *v.* Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. * * * (page 109)
>
> "Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. * * * And so Congress afforded out-of-State litigants another tribunal, not another body of law. The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law. Certainly the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident." (pages 111 and 112)

B. The salutary doctrine of *Erie* v. *Tompkins* has no connection as such with the common law concepts of "substance" and "procedure"; and the very use of the word "substantive" by the Circuit Court in the principal case was error.

In *Guaranty Trust Co.* v. *York (supra)* this court specifically held that since the question is whether it significantly affects the result of a litigation for a Federal Court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State Court:

> "It is therefore immaterial whether statutes * * * are characterized either as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific issue before us." (page 109)[4]

III. In the light of the Erie v. Tompkins decision, Section 3 of the Federal Arbitration Act is necessarily limited in its application to cases involving foreign or interstate commerce or where Federal jurisdiction is based on grounds other than diversity of citizenship.

1. The cases relied upon by the Circuit Court are not authority to the contrary.

In the principal case, the Circuit Court per Judge Frank relies on *Shanferoke Coal and Supply Corp.* v. *Westchester Service Corp.*, 70 F. 2d 297 (CCA 2, 1934), aff'd 293 U. S. 449, 79 L. Ed. 583 (1935), *Agostini Bros. Bldg. Corp.* v. *United States*, 142 F. 2d 854 (CCA 4, 1944), *Murray Oil Products Co.* v. *Mitsui & Company*, 146 F. 2d 381 (CCA 2, 1944) and *Parry* v. *Bache*, 125 F. 2d 493 (CCA 5, 1942), for the proposition that in a diversity case such as the case at bar a stay should be granted under Section 3 of the Federal Arbitration Act. Yet none of those cases involved the issue now before this court.

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[4] See also *Macias* v. *Klein*, 203 F. 2d 205, 207 (CCA 3, 1953) and *Perkowitz* v. *Humphrey*, 130 F. Supp. 142, 145.

In *Macias* v. *Klein*, the Federal Circuit Court for the Third Circuit held that although the Supreme Court of Pennsylvania held the State Statute of Frauds to "have procedural rather than substantive effect" (citing cases). "It operates to deny enforcement in the Pennsylvania courts of all contracts wherever made which do not comply with its requirements and not merely to render void such nonconforming contracts as may be made in Pennsylvania. It is nonetheless a statute which under the doctrine of *Erie R. R. Co.* v. *Tompkins* . . . must be applied in a federal district court sitting in Pennsylvania in a case of diverse citizenship to deny enforcement of such a contract. For from the Erie standpoint it must be regarded as substantive since its application will significantly affect the result of the litigation (citing, among others, *Guaranty Trust Co.* v. *York* and *Angel* v. *Bullington*)."

The *Shanferoke* case involved an interstate transaction for the sale and delivery of coal. In the Circuit Court a stay was ordered under the provisions of 9 USC Section 3, and Judge Learned Hand said in his opinion that the operation of Section 3 was not necessarily limited by the definitions in Section 2 of the Act. But note that that falls short of a definite statement that it is in fact of broader scope, and note further that Judge Hand ends his discussion of this question by saying that "It is not necessary, however, to decide the point here, because the contract involved commerce as defined in Section 1." (page 299).

The Supreme Court affirmed the *Shanferoke* case in 1935, three years before the decision in *Erie R. R. Co.* v. *Harry J. Tompkins* overruled *Swift* v. *Tyson (supra)* and established a wholly new philosophy as to the interplay of Federal and State law.[5]

Hence *Shanferoke* v. *Westchester* cannot be cited as authority that in diversity cases, under the Erie rule, the federal law as to arbitration should be applied to the exclusion of conflicting local state law, because it was based on a view of diversity jurisdiction which came to an end with *Erie R. R. Co.* v. *Tompkins.*[6]

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[5] "*Erie R. R. Co.* v. *Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process . . . Prior to *Erie R. R. Co.* v. *Tompkins* it was not necessary, as we have indicated, to make the critical analysis required by the doctrine of that case of the nature and jurisdiction of the federal courts in diversity cases." *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 107, 110, 89 L. Ed. pp. 2079, 2082, 2087.

[6] See discussion of the case of *Lupton Sons* v. *Automobile Club*, 225 U. S. 489, 56 L. Ed. 1177 (1912) by this court in *Angel* v. *Bullington*, 330 U. S. 183, 192, 91 L. Ed. 832, 838 (1947).

In *Parry* v. *Bache (supra)*, the court decided that

> "the agreement being clearly one 'evidencing a transaction involving commerce', we do not undertake to determine whether as ably argued, by appellees, the invoked section of the arbitration act (section 3 of Title 9, USC.) is broader than the preceding sections and, not limited as those are, to maritime transactions and those involved in commerce, extends to all issues 'referable to arbitration under an agreement in writing for such arbitration.'" 125 F. 2d p. 495.

Thus the Fifth Circuit Court in that case specifically declined to decide the very question involved in this appeal.

Agostini Bros. Bldg. Corp. v. *United States*, 142 F. 2d 854, (CCA 4, 1944) involved an action brought by the United States in the Federal Court under the Miller Act on behalf of a sub-contractor against a contractor on the latter's bond to recover for labor and materials furnished in the construction of a government building. Hence that case did not fall within the class of cases to which the Erie Doctrine applies.[7] The court's sweeping language in that decision as to the wide scope of Section 3 of the Federal Arbitration Act is not justified by the issues there at bar.

Murray Oil Products v. *Mitsui and Company* had to do with a transaction in foreign commerce, so that again the court did not, in fact, face the issue of whether Section 3 could be applied to diversity cases.[8] Neither did the court

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[7] This court in *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832 (1947), carefully distinguished diversity cases from those where "resort is had to a Federal Court *not on grounds of diversity of citizenship but because a Federal right is claimed . . .*" (emphasis added) Page 192 and see quotation from *Erie R. R. Co.* v. *Tompkins (supra)* in footnote 3.

[8] Similarly practically all of the other appellate court decisions that have discussed the scope of Section 3 of the Act have involved interstate or foreign commerce or some ground for federal jurisdiction other than or in addition to diversity of citizenship.

(Footnote continued on next page)

have to choose between conflicting state and federal law. The case had been originally brought in a New York State court and then removed. Both the federal and New York statutes enforce arbitration agreements. If it were not for this fact, the failure of the court in the *Murray Oil* case to even mention the *Erie* decision would be a striking oversight.

2. Choice of the forum is a substantial right within the definition of Guaranty Trust Co. v. York.

The circuit court below relies upon a statement in the opinion in *Murray Oil Products Company* v. *~~Mitsui~~ and Company (supra)*, to the effect that "arbitration is merely a form of trial, to be adopted in the action itself, in place

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TAFT-HARTLEY ACT (LABOR MANAGEMENT RELATIONS ACT):

Shirley-Herman Co. v. *International Hod Carriers*, 182 F. 2d 806 (CCA 2, 1950);

International Union United Furniture Workers v. *Colonial Hardwood Flooring Company*, 168 F. 2d 33 (CCA 4, 1948);

Tenney Engineering, Inc. v. *United Electrical Workers*, 207 F. 2d 450 (CCA 3, 1953);

FAIR LABOR STANDARDS ACT OF 1938:

Donahue v. *Susquehanna Collieries Co.*, 138 F. 2d 3 (CCA 3, 1943);

Watkins v. *Hudson Coal Co.*, 151 F. 2d 311 (CCA 3, 1945), cert. den. 327 U. S. 777, 90 L. Ed. 1005 (1946);

INTERSTATE AND FOREIGN COMMERCE:

Amalgamated Association v. *Pennsylvania Greyhound Lines*, 192 F. 2d 310 (CCA 3, 1951);

MARITIME TRANSACTIONS—ADMIRALTY LAW:

Marine Transit Corp. v. *Dreyfus*, 284 U. S. 263, 76 L. Ed. 282 (1932);

Kulukundis Ship Co. v. *Amtorg Trading Corp.*, 126 F. 2d 978 (CCA 2, 1942);

Pahlberg Petition, In Re, 131 F. 2d 968 (CCA 2, 1942);

The Gerald A. Fagan, 49 F. 2d 215 (CCA 2, 1931).

of a trial at common law—it is like a reference to a master, or an 'advisory trial' ". (page 383)

This statement ignores the very issue before this court. It glosses over the real differences between the proceedings under an ordinary rule of reference on the one hand and an arbitration on the other. These are more than sufficient to produce a substantially different result within the meaning of *Guaranty Trust Co.* v. *York (supra).*

Rule 30 of the Commercial Arbitration Rules of the American Arbitration Association, which are set forth as controlling arbitration procedure under the contract of the parties in this case (R. 4), provides among other things as follows:

> ". . . The arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary."

In contrast, the Vermont Statute on Reference of Causes by the supreme or county court provides:

> ". . . Such referees shall be governed by the rules of law in the admission of evidence and determination of the issue and shall state in their report decisions made as to the admission or rejection of evidence, when the party against whom the decision is made so requests in writing."
>
> Vermont Statutes, Revision of 1947, Section 1936.

In the recent case of *Wilko* v. *Swan*, 346 U. S. 427, 98 L. Ed. 168 (1953), involving a situation quite analogous to that in the principal case, the respondent relied on *Murray Oil Products Company* v. *Mitsui and Company* (*supra*) for the very proposition here advanced by the Circuit Court, and this court in disposing of that argument stated that

> ". . . As their (the arbitrators') award may be made without explanation of their reasons and without a complete record of their proceedings, the arbi-

> trators' conception of the legal meaning of such statutory requirements as 'burden of proof', 'reasonable care' or 'material fact' . . . cannot be examined. Power to vacate an award is limited . . . In unrestricted submissions . . . the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." (pages 436-437)

This court then cites (page 437) *Boyd* v. *Grand Trunk Western R. Co.*, 338 U. S. 263, 94 L. Ed. 55, and states that in that case

> "*We said the right to select the 'forum' even after the creation of a liability is a 'substantial right'.*"[9] (emphasis added)

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[9] To grant a stay of the action in the Federal District Court until arbitration is had would result in forcing the appellant to arbitrate. We cite our own experience as a case in point. Here the respondent has commenced arbitration proceedings, and before we could perfect our petition to this court from the Circuit Court it attempted to proceed with arbitration before the American Arbitration Association in New York City. That award would have been an award enforceable in the Courts of New York State, regardless of the results here. (*Sturges & Murphy, Some Confusing Matters Relating to Arbitration under the United States Arbitration Act*, 17 Law and Contemporary Problems, 580, page 604.)

Even now, an application of Section 3 to stay this action would compel our client to arbitrate this case just as effectively as an order under Section 4. Hence, it is unrealistic to deny that Section 3 is an enforcement provision, whatever technical distinctions can be made about "specific enforcement" as a word of art in the field of equity jurisprudence. We say that in effect Section 3 does enforce arbitration and that under the *Erie* Doctrine it must be limited in its application to cases involving interstate or foreign commerce or where some federal right is involved. The arguments to the contrary overlook what actually must happen when a stay is granted.

3. Section 3 of the Federal Arbitration Act does not apply in the field of Diversity Federal Jurisdiction.

Only one of the circuit courts has decided the specific issue before this court. Significantly, it is the only Circuit Court opinion involving Section 3 of the Federal Arbitration Act to mention *Erie* v. *Tompkins*. In *Tejas Development Company* v. *McGough Bros.*, 165 F. 2d 276, (CCA 5, 1947) the plaintiff, of Minnesota, brought suit against a Texas defendant in a Federal District Court in Texas to enforce the awards made in two separate arbitration proceedings arising out of alleged breaches of contracts for the construction of buildings and the grading and paving of streets in a Texas town.

Texas, as does Vermont, follows the common law under which: ". . . the general rule is well settled that either (party) can revoke the submission at any time before an award has been made (citing *C. J. Arbitration and Award,* Section 92 . . .). This is the very sort of agreement that the law says cannot be enforced so long as it is executory . . . the law does not favor unwilling arbitrations, and therefore, it permits either party to make timely withdrawal from such contracts, and even from an actual submission prior to an award". *Tejas* v. *McGough Bros. (supra)* at pages 279, 280.

The court, while it upheld in part one of the awards in the dispute since both parties had voluntarily submitted the dispute to arbitration and neither had withdrawn prior to that award, nevertheless states that "The invalidity of the second award is clear. Appellant so soon as arbitration was proposed positively refused to appoint an arbitrator or to make a submission. It did not appear at any hearing or do anything that could be a ratification or waiver. The arbitrators appointed by others and proceeding ex parte could not make a binding award." (page 281)[10]

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[10] The Sixth Circuit appears to agree with the Fifth Circuit that State law controls in diversity cases. *Gatliff Coal Co.* v. *Cox*, 142 F. 2d 876 (CCA 6, 1944). That case was originally brought

(Footnote continued on next page)

The court there held that such contracts were governed by Texas law as to enforceability of arbitration agreements and not by the Federal Arbitration Act stating, at pages 278-279:

> "But it is argued that the enforcement sections which follow (Section 2 of the Federal Arbitration Act) are in broader terms and cover all controversies involving arbitrations of which a federal court may obtain jurisdiction, *though only because of diversity of citizenship, as here.* This may be true to the extent that the summary procedures by motion can be resorted to as a federal procedural matter; but that does not help here, for the question is not as to the method of enforcement of a valid award, but of the validity of the awards and the binding effect of the agreement to arbitrate, both of which are matters of State substantive law, since contract and arbitrament arose under State law. *The awards can become no better by going into a federal court to enforce them than they would be in State Courts, Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 ALR 1487 and cases following it." (emphasis added).

See also *Franke* v. *Wiltschek*, 209 F. 2d 493 (CCA 2, 1953); *Clain* v. *City of Burlington*, 202 F. 2d 532 (CCA 2, 1952); *Edwards* v. *McCullough*, 114 F. Supp. 767 (W. D. Ky.); and *Macias* v. *Klein*, 203 F. 2d 205 (CCA 3, 1953).

Each of those was a diversity case, and although they did not involve the enforcement of arbitration contracts, each supports the general principle laid down by Mr. Justice

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in a Kentucky State court and later removed to the United States District Court. The Circuit Court, on appeal, ruled (page 881) that arbitration was a matter of remedy and that the law which governs remedies is the law of the forum. It then proceeded to declare Kentucky law the law of the forum and refused to grant a stay under Section 3 of the Federal Arbitration Act on the ground that: "The Rule prevails in Kentucky that parties may not by contract deprive themselves of the right to resort to courts for the settlement of their controversies. It is our duty to expound, not make the law of the state." (page 881).

Douglas in *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 538, 93 L. Ed. 1524, 1527 (1949), namely that

> "The York case (meaning *Guaranty Trust Co.* v. *York*) was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case."

Conclusion

All of the cases which have favored a broader application for Section 3 of the Arbitration Act ultimately trace their authority to Judge Hand's dictum in *Shanferoke* v. *Westchester (supra)*. *Shanferoke* was decided three years before *Erie* v. *Tompkins* overruled the venerable case of *Swift* v. *Tyson*. With the exception of *Tejas* v. *McGough* none of the courts have been confronted with the necessity of choosing between conflicting Federal and State rules on arbitration in a case where Federal jurisdiction was based solely on grounds of diversity of citizenship. It is petitioner's contention that whether or not *Shanferoke* v. *Westchester* was good law when it was decided, in the light of the decision in the *Erie* case the Federal Arbitration Act is necessarily limited to cases involving commerce or where jurisdiction is based on some ground other than or in addition to diversity of citizenship. Where, as in *Murray Oil Products*, there is no conflict between Federal and State law as to arbitration, this question does not arise, because the result is the same whichever law is applied.

The decision below should, therefore, be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 49

NORMAN C. BERNHARDT,
Petitioner,

vs.

POLYGRAPHIC COMPANY OF AMERICA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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IN THE

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Norman C. Bernhardt,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

A. Whatever the respondent may quote in criticism of the Common Law rule denying enforceability to arbitration agreements, such is still the law of Vermont and of other states which have not found it necessary to enact arbitration legislation. That this is the law of Vermont was decided by Judge Gibson, in this case, sitting in the Federal District Court for the District of Vermont, (R 17), and has been conceded by the respondent in the district court and again in the circuit court.

Similarly, Judge Gibson in holding that Vermont common law as to enforceability of arbitration must be applied impliedly rejected the respondent's argument that the New York Arbitration Statute would be applied in a Vermont Court.

The decisions of a federal district judge on matters of state law, with which the Circuit Court of Appeals did not disagree, should be given great weight in this court.

Steele v. *General Mills*, 329 U. S. 433, 439, 91 L. Ed. 402, 407, (1947);
Hillsborough Township v. *Cromwell*, 326 U. S. 620, 630, 90 L. Ed. 358, 367 (1946);
MacGregor v. *State Mutual Life Assurance Co.*, 315 U. S. 280, 86 L. Ed. 846 (1942).

B. The New York Arbitration Act does not govern enforceability of arbitration in Vermont merely because the contract was executed in New York or because the parties agreed that New York law should control.

Meachem v. *Jamestown F. & C R. R. Co.*, 211 N. Y. 346, (1914);
Berkovitz v. *Arbib et al*, 230 N. Y. 261, (1921);
Marchant v. *Mead-Morrison Co.*, 252 N. Y. 284, (1929);
Matter of Gantt v. *Hurtado*, 297 N. Y. 433, (1948);
Shafer v. *Metro-Goldwyn-Mayer*, 36 Ohio App. 31, (1929);
Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109, 68 L. Ed. 582;
Beale, "*The Conflict of Laws*", (1935 Ed.) Sec. 347.5 at pgs. 1245-46, 1247.

Beale, at page 1247, states that

> "If the arbitration agreement provides *specifically* that the arbitration is to be held in a state other than the forum, *lex fori* governs nevertheless. Thus, if the arbitration provided for is to be held in an enforcing state and the forum is a non-enforcing one, the arbitration provision will nonetheless be disregarded." (citing *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S. D. N. Y. 1915); *The Eros*, 241 Fed. 186 (S. D. N. Y. 1916), aff'd 251 Fed. 45 (CCA 2, 1918). See also *Shafer* v. *Metro-Goldwyn-Mayer*, 36 Oh. App. 31, 172 N. E. 689 (1930).)

Meachem v. *Jamestown F & C R. R. Co.*, 211 N. Y. 346 (1914) was decided before the New York Arbitration Law was enacted, and the New York Court of Appeals there held that arbitration is a matter of remedy and so is governed by the lex fori and that (page 351)

> "Notwithstanding the decision of the courts of Pennsylvania that the contract as to arbitration was valid and enforceable in that state, judicial comity does not require us to hold that such provision of a contract which is contrary to a declared po[illegible] of our courts (citing cases) shall be enforced as between non-residents of our jurisdiction in cases where the contract is executed and to be performed without this state, and denied enforcement when made and performed within our state."

and further, per Judge Cardozo in a concurring opinion (at page 352), that

> "An agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum. * * * Such a contract, whatever form it may assume, affects in its operation the remedy alone."

In *Berkovitz* v. *Arbib, et al*, 230 N. Y. 261, the same court held that the New York Arbitration Act merely established a new remedy in New York Courts for the breach of an agreement to arbitrate, saying, per Cardozo, J. (at page 270)

> "The common-law limitation upon enforcement of promises to arbitrate is part of the law of remedies. (citing cases) The rule to be applied is the rule of the forum. * * * *This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing.* * * * Changes in the form of remedies are applicable to proceedings thereafter instituted for the redress of wrongs already done." (emphasis added)

and at page 272

> "All that the statute has done is to make two remedies available when formerly there was one."

In *Matter of Marchant* v. *Mead-Morrison Co.*, 252 N. Y. 284, the New York Court of Appeals ordered arbitration of a dispute arising under a contract drawn and to be executed in Massachusetts between parties resident in New York and in Maine on the ground that (page 294)

> "The law of the forum tells us whether the remedy for the breach of an agreement shall be specific performance or damages."

in spite of the fact that the court presumed (page 303) that the rule as to enforceability in Massachusetts at the time of the making of the contract was the common law rule as established in New York (namely that specific performance would be denied, *Meachem* v. *Jamestown, supra*).

At page 305, Crane J., concurring in part with the majority decision said

> "With part of the opinion in this case I am in accord. Arbitration being the remedy in case of a breach of a contract, that remedy could be enforced in accordance with the Arbitration Law of the State of New York in the same way as other legal remedies would follow the procedure peculiar to this State. Thus, a question triable before a jury in Massachusetts might be triable before a court without a jury in New York or *vice versa*."

Matter of Gantt, 297 N. Y. 433, 438-439, involved a North Carolina contract entered into between two non-residents of New York and containing an arbitration clause. After demand for arbitration, suit was commenced by Gantt in New York, to restrain the proposed arbitration, claiming as one ground that the agreement was void in North Carolina. The Court of Appeals first decided that the contract was valid but unenforceable under the common law of North

Carolina and then proceeded to hold that arbitration could and would be enforced in New York where both parties were in court on the ground that

> "It is the law of the forum which, traditionally, controls as to remedies (cases and authorities). 'An agreement that all differences arising under a contract shall be submitted to arbitration' relates to the law of remedies, and the law that governs remedies is the law of the forum' wrote Judge Cardozo in his concurring opinion in *Meachem* v. *Jamestown, F. & C. R. R. Co.*, (211 N. Y. 346, 352). This rule thus expressed is well settled by other decisions, *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 124, *supra; Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263, 277; *The Atlanten*, 250 F. 935, 937, affd. 252 U. S. 313; *Matter of Berkovitz* v. *Arbib & Houlberg*, *supra*, 230 N. Y. at p. 270; *Gilbert* v. *Burnstine*, 255 N. Y. 348, 354), and text writers (2 Beale on *Conflicts of Laws* (1935), p. 1158)."

Shafer v. *Metro-Goldwyn-Mayer*, 36 Ohio App. 31, 172 N. E. 689, was a suit seeking the enforcement in Ohio of an award of arbitrators made in New York under a contract between a resident of Ohio and a New York corporation containing an arbitration clause similar to the one here in question and providing further that

> "The provisions of this contract relating to arbitration shall be construed according to the laws of the State of New York"; (p. 34)

and embodying sections of the New York Arbitration Law under which the arbitration agreement would be valid, enforceable and irrevocable.

The Ohio Court held, at page 37, that the parties would have the power to adopt New York law as controlling their substantive rights under the contract but that

> ". . . only that remedy which is available in the forum where the contract is sought to be enforced is available to the plaintiff."

and that plaintiff's only remedy for defendant's refusal to arbitrate was an action at law for damages.

The Supreme Court of the United States in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 68 L. Ed. 582 (1924) recognized that the New York arbitration law was not intended to have extraterritorial effect.

That case involved damages resulting from delay in the transportation of fruit. The parties had entered into a charter party executed in New York and containing a New York type arbitration clause. Red Cross Line appointed an arbitrator, and the New York Supreme Court ordered the Atlantic Co. to appoint its arbitrator. This order was affirmed in the appellate division but reversed in the Court of Appeals on the ground that maritime contracts must be excluded from the operation of the New York Arbitration Act to satisfy the requirements of the United States Constitution. (In 1924 there was no Federal Arbitration Act.)

The United States Supreme Court held that the state court had jurisdiction in personam of maritime contracts concurrently with maritime courts and that (p. 124)

> "New York, therefore, had the power to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement for arbitration which is valid by the general maritime law, as well as by the law of state, which is contained in a contract made in New York, and which, by its terms is to be performed there.
>
> "This state statute is wholly unlike those which have recently been held invalid by this court. *The Arbitration Law deals merely with the remedy in the state courts* in respect of obligations voluntarily and lawfully incurred." (emphasis added)

And at the end of his opinion, (p. 125), Justice Brandeis, speaking for the court, recognized that the New York Arbitration Law constitutionally could be applied to this maritime transaction because it was a "remedy provided by

New York *for use in its own courts*" only. (emphasis added) See also, *Lappe* v. *Wilcox,* 14 F. 2d 861, 864, where the United States District Court for the Northern District of New York held that

> "* * * there is nothing in the statute which suggests that it was intended to be extended beyond the courts of the state. While the statute does not in so many words refer to or limit its provisions to state courts, that is its plain intent."

The Vermont Supreme Court has held similarly that the question of the applicable remedy is determined according to the law of the forum. Thus, in *Brown* v. *Perry,* 104 Vt. 66, a wrongful death action, the court, although it applied New Hampshire law as to plaintiff's right to recover, held at page 73 that the measure of plaintiff's recovery, since it pertained to the remedy and did not limit the right of action or its inherent elements and character, was governed by the *lex fori,* the law of Vermont, and that under Vermont law, recovery could be had only for pecuniary loss suffered by the next of kin.

Under the authority of those cases, it seems clear, First, that the New York Arbitration Act is limited in its application to cases brought before the courts of that state and was not intended to have extraterritorial effect and, Second, that arbitration being a matter of remedy, the law of the State of the forum (Vermont, in the principal case), would govern regardless of a contrary intent in the enactment of legislation in any other state. Hence it follows that no question of conflicts of law, full faith and credit or comity can be involved in the case here before this court.

C. The parties were without power to bind either themselves or the Vermont or Federal District Court by their purported agreement that the laws of the State of New York should govern all disputes that might arise under or in connection with their contract.

The same attempt was made in the contract involved in *Shafer* v. *Metro-Goldwyn-Mayer, (supra)*, but the Ohio Court held in that case at page 41 that

> "* * * the common pleas court in Ohio was without power, was not bound, and could not be required to give force and effect to (the New York Arbitration Law)."

and at page 43 that

> "Plaintiff could be in no stronger position to enforce (the arbitration agreement) in Ohio under the New York Law making an arbitration agreement irrevocable than under a formal contract wherein the parties agree that it should be irrevocable."

Beale, in his treatise on *The Conflict of Laws* (1935 Ed.), Vol. II, (Section 347.5) p. 1245, in like manner states that

> "* * * the law of the forum determines their enforceability regardless of the place where the contract containing an arbitration provision was made, or was to be performed, *or the law intended by the parties to govern*." (emphasis added)

D. The foregoing discussion renders irrelevant any consideration of the specific provisions of the New York Arbitration Act.

E. *Weiner et al.* v. *Prudential Insurance Company,* 110 Vt. 22 (1938) merely held that a suit at law to collect on a life insurance policy would be continued pending the disposition of exceptions to the findings and decree in a chancery action previously brought by the insurance company asking cancellation of the policy on the ground of fraud by the insured. The court emphasized that where the relief sought and the mode of proceeding are different the jurisdiction of neither the law court nor the chancery court is affected by the proceedings in the other. It is difficult to see how this case indicates, as claimed by the respondent at page 37 of its brief, that a Vermont court would stay the petitioner's action pending determination of the issues in an arbitration proceeding.

It is unnecessary to discuss the other Vermont cases cited by respondent at page 37 of its brief. None of those cases in their consideration of what law determines the rights of parties to a contract passes upon the question of what law governs the remedy by which those rights may be enforced.

F. The second section of the respondent's brief raises no new issues.

We wish only to call the court's attention to three matters that help to resolve the confusion that is generated by certain aspects of the respondent's brief.

1. The right to specific enforcement of an arbitration agreement is universally regarded as a matter of remedy, and all that the New York Arbitration Act has done is to add to the common law right to damages a new remedy of enforcement in the New York courts. *Berkovitz* v. *Arbib*, *(supra)*.

2. *Wilko* v. *Swan*, 346 U.S. 427, 98 L. Ed. 168, is, as our opponents appear to agree (see page 34 of respondent's brief), authority for the fact that substitution of arbitration for a right to a trial by jury is a substantial modification of the rights of the parties. In fact, that is one of the principal grounds relied upon by this court in that case for its holding that it would *not* enforce the arbitration agreement.

3. In footnote 3 on page 35 of its brief, the respondent mis-cites *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832 (1947). The full sentence, of which they quote only a part is as follows:

> "Of course, where resort is had to a federal court *not on the grounds of diversity of citizenship but*

> *because a federal right is claimed*, the limitations upon the courts of a State do not control a federal court sitting in the State." (p. 192) (emphasis added).

Mr. Justice Frankfurter was thus carefully distinguishing diversity cases, such as that case and the case at bar, from cases where the jurisdiction had other foundation than diversity.

Angel v. *Bullington* is, in fact, a case in point for our main proposition, namely, that in this diversity case the Erie Doctrine requires the Federal District Court to apply Vermont Law, unwritten as well as written, so as to reach a result not substantially different from what it would be in a state court.

Conclusion

Based upon the authorities above cited the answers to the questions presented by respondent at page 15-A of its brief, are as follows:

1. For the reasons set forth in our main brief, *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, and *Guaranty Trust Company* v. *York*, 326 U. S. 99, 89 L. Ed. 2079, do require in this case that the revocability of the arbitration clause be determined by the law of the State of Vermont.

2. The respondent is not entitled to a stay of the action in the U. S. District Court for the District of Vermont in accord with the arbitration statute of the State of New York, because that statute, as demonstrated above, has no applicability to any attempt to enforce an arbitration agreement in a tribunal outside of the geographical limits of the State of New York.

3. For the reasons set forth in our main brief, the respondent is not entitled to a stay of the action in the United

States District Court for the District of Vermont under the provisions of Section 3 of the United States Arbitration Act.

The decision below should, therefore, be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. ~~7[illegible]~~ [illegible]

Norman C. Bernhardt,

Petitioner.

vs.

Polygraphic Company of America, Inc.,

Respondent.

Brief In Opposition To Petition For Certiorari To The United States Court of Appeals For The Second Circuit

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FILED 1955.

No.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

A. Opinions Below

Proceedings in this case are reported at 122 F. Supp 733 (D.C. Vt. 1954) and 218 F.2d 948 (2d Cir. 1955).

B. Argument

Petitioner says that Section 3 of the United States Arbitration Act (9 U.S.C., Section 3) may not be applied in diversity cases by a federal court sitting within the boundaries of a "non-enforcing state" such as Vermont. He says that the *Erie* doctrine requires the federal court to disregard the federal statute in order that the "substantial result" of the litigation may be conformed to that which would obtain under the procedure of the state courts. He says that the opinion of the Court of Appeals herein disregards the views of this Court expressed in *Guaranty Trust v. York*, 326 U.S. 99 and related cases, e.g., *Angel v. Bullington*, 330 U.S. 183, *Woods v. Interstate Realty Co.*, 337 U.S. 535, and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541. But examination of those authorities shows that this court was there dealing with a problem which is remote from the one at hand. Those cases involved the attempt to enforce in federal court a state-created right which had become unenforceable in state court. No federal right was involved in those cases and this Court recognized (330 U.S. at page 192) that where a federal right is claimed: "The limitations upon the courts of a state do not control a federal court sitting in the State." Likewise, in the *Guaranty Trust* case, this court "put to one side the considerations relevant in disposing of questions that arise when a federal court is adjudicating a claim based on federal law." (326 U.S. at page 101). Nothing in these cases implies that Congress must conform the procedure of the federal courts to that followed in the state courts.

Petitioner says further that the decision of the Court of Appeals in this case conflicts with decisions in the Fifth and Sixth Circuits. But the cases he cites do not have the effect claimed. *Gatliff Coal Co. v. Cox*, 142 ~~F.2d~~ 876 (6th Cir. 1944) held that the United States Arbitration Act did not, by its terms, apply to an agreement to arbitrate a dispute arising under the Fair Labor Standards Act (29 U.S.C., Section 201, et seq.). *Tejas Development Co. v. McGough Bros.*, 165 F.2d 276 (5th Cir. 1947) held that an arbitration award which was invalid under state law, and which had been announced prior to the commencement of any proceedings in the federal court, had no greater validity in federal court than it would have had in state court. Here too the court decided that the federal statute did not by its terms apply. Neither of these cases suggests that the federal statute, had it been found applicable, would have been disregarded because the state courts would not have provided analagous relief. In fact, the decision of the Court of Appeals in this case is in harmony with the only cases actually involving this issue—*Murray Oil*

Products Co. v. Mitsui & Co., 146 F.2d 381 (2d Cir. 1944) in the same circuit and, in the Fifth Circuit, *Parry v. Bache*, 125 F.2d 493 (5th Cir. 1942): Both of these were removed cases, both involved application for relief under Section 3 of the United States Arbitration Act, and in each the court held that it was the federal and not the state procedure which governed.

CONCLUSION

C. WHEREFORE respondent prays that the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit be denied.

Respecfully submitted,

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No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

NORMAN C. BERNHARDT,

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v.

POLYGRAPHIC COMPANY OF AMERICA, INC.

Respondent.

RESPONDENT'S BRIEF

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ERRATA TO RESPONDENT'S BRIEF

Respondent apologizes to the court for errors and omissions in its brief on the merits and respectfully requests the Court to note the following changes in the text of Respondent's brief.

Page 6. Add the following paragraph at the conclusion of the text on this page.

"§ 1466. *Effect of judgment and enforcement.*

The judgment so entered has the same force and effect, in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered."

Page 13. Fourth paragraph, third line, read "Rule 7" instead of "Rule".

Page 15. Fourth paragraph, last line, read "substantive law" instead of "substantial law".

Page 20. Last paragraph, first word, read "Thus" instead of "This".

Page 26. Second paragraph, fifth line, read "invalidity" instead of "inability".

Berkowitz v. Arbib & Howlberg, 230 N.Y. 261, 276 (1921).
Bradford Woolen Corp. and Freedman, (Sup. Ct. Sp. Term, N. Y. County, 1947) 189 Misc. 242, 71 N.Y.S. 2d. 257). 17
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California Prune & Apricot Growers. Ass'n. v. Catz American Co., 60 F. 2d. 788 (9th Cir. 1932) 37
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Prosperity Co. v. American Laundry Machinery Co., 271 App. Div. 622, 67 N.Y.S. 2d. 669; Aff'd without opinion 297 N.Y. 486, 74 N.E. 2d. 188 (1947). 29, 30
Rae v. Luzerne County, 58 F. 2d 829 (N. D. Pa. 1932 36
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Weiner et al. v. Prudential Ins. Co., 110 Vt. 22 at pages 26-27 37
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PROVISIONS OF THE CONSTITUTION

INVOLVED

CONSTITUTION OF THE UNITED STATES

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State: And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

PROVISIONS OF THE
STATUTES INVOLVED

In addition to the provisions of the United States Arbitration Act as quoted in Petitioner's Brief pp. 2-3, the following sections of the New York Arbitration Law (L. 1920, ch. 275; Consol. Laws, ch. 72) as amended into Art. 84 of the New York Civil Practice Act, §§1448-1449 and now in effect are involved in this case:

§1448. *Validity of arbitration contracts or submissions.*

Except as otherwise prescribed in this section, two or more persons may submit to the arbitration of one or more arbitrators any controversy existing between them at the time of the submission, which may be the subject of an action, or they may contract to settle by arbitration a controversy thereafter arising between them and such submission or contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. A written submission or provision in a written contract between a labor organization, as defined in subdivision five of section seven hundred one of the labor law, and employer or employers or association or group of employers to settle by arbitration a controversy or controversies existing at the time of submission or thereafter arising between the parties to the contract including but not restricted to controversies dealing with rates of pay, wages, hours of employment or other terms and conditions of employment of any employee or employees of such employer or employees shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract, without regard to the justiciable character of such controversy or controversies.

Such submission or contract may include questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent, subsequent to or independent of any issue between the parties.

A controversy cannot be arbitrated, either as prescribed in this article or otherwise, in either of the following cases:

1. Where one of the parties to the controversy is an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy or habitual drunkenness unless the appropriate court having jurisdiction approve a petition for permission to submit such controversy to arbitration made by the general guardian or guardian ad litem of the infant or by the committee of the incompetent.

2. Where the controversy arises respecting a claim to an estate in real property, in fee or for life.

But where a person capable of entering into a submission or contract has knowingly entered into the same with a person incapable of so doing, as prescribed in subdivision one of this section, the objection on the ground of incapacity can be taken only in behalf of the person so incapacitated.

Subdivision two of this section does not prevent the arbitration of a claim to an estate for years, or other interest for a term of years, or for one year or less, in real property; or a controversy respecting the partition of real property between joint tenants in common; or of a controversy respecting the boundaries of lands or the admeasurement of dower.

§1449. *Form of contract or submission.*

A contract to arbitrate a controversy thereafter arising between the parties must be in writing. Every submission to arbitrate an existing controversy is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent.

§1450. *Remedy in case of default.*

The making of a contract or submission for arbitration described in section fourteen hundred forty-eight, providing for arbitration in this state, shall be deemed a consent of the parties thereto to the jurisdiction of the supreme court of this state to enforce such contract or submission and to enter judgment on an award thereon. A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, described in such section may petition the supreme court, or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in such contract or submission.

Eight days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner specified in the contract or submission and if no manner be specified therein, then in the manner provided by law for personal service of a summons within or without the state, or substituted service of a summons, or upon satisfactory proof that the party aggrieved has been or will be unable with due diligence to make service in any of the foregoing manners, then such notice shall be served in such manner as the court or judge may direct. The court, or judge thereof, shall hear the parties and upon being satisfied that there is no substantial issue as to the making of the contract or submission or the failure to comply therewith, the court, or the judge thereof, hearing such application, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract or submission.

If evidentiary facts be set forth raising a substantial issue as to the making of the contract or submission or the failure to comply therewith, the court, or the judge thereof, shall proceed immediately to the trial thereof. If no jury trial be demanded by either party, the court, or the judge thereof, shall hear and determine such issue. Where such an issue is raised, any party may not later than five days after the service of the order directing a trial of such issue demand a jury trial of such issue, and if such demand be made, the court, or the judge thereof, shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action. Whenever an immediate trial is ordered the order therefor shall provide that if the court, or where a jury has been demanded, the jury, find that a written contract providing for arbitration was made or a submission was entered into, as the case may be, and that there was a failure to comply therewith, the parties shall proceed with the arbitration in accordance with the terms of the contract or submission, and said order shall provide that if the court or jury, as the case may be, find that there was no such contract or submission or failure to comply therewith then the proceeding shall be dismissed.

The procedure herein provided shall be applicable to any motion made under this article in which an issue is raised as to the making of the contract or submission or the failure to comply therewith.

§1451. *Stay of proceedings brought in violation of an arbitration contract or submission.*

If any action or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission described in section fourteen hundred forty-eight, the supreme court or the court in which such action or proceeding shall be brought, or a judge thereof, upon being satisfied that the issue involved in such action, or proceeding is referable to arbitration under a contract or submission described in section fourteen hundred forty-eight, shall stay all proceedings in the action or proceeding until such arbitration has been had in accordance with the terms of the contract or submission.

§1452. *Provision in case of failure to name arbitrator or umpire.*

If, in the contract for arbitration or in the submission, described in section fourteen hundred forty-eight, provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method is provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or for any reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then, upon application by either party to the controversy, the supreme court or a judge thereof, shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act upon said contract or submission with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided, the arbitration shall be by a single arbitrator.

§14[illegible] *Arbitration a special proceeding.*

Arbitration of a controversy under a contract or submission described in section fourteen hundred forty-eight shall be deemed a special proceeding, of which the court specified in the contract or submission, or if none be specified, the supreme court for the county in which one of the parties resides or is doing business, or in which the arbitration was held, shall have jurisdiction.

Any application to the court, or a judge thereof, hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§1461. *Motion to confirm award.*

At any time within one year after the filing or delivery of an award made as prescribed in section fourteen hundred sixty any party to the controversy which was arbitrated may apply to the court having jurisdiction as provided in section fourteen hundred fifty-nine for an order confirming the award; and thereupon the court must grant such an order unless the award is vacated, modified or corrected, as prescribed in sections fourteen hundred sixty-two, fourteen hundred sixty-two-a and fourteen hundred sixty-three or unless the award is unenforceable under the provisions of section fourteen hundred fifty-eight. Notice of the motion must be served upon the adverse party or his attorney, as prescribed by law for service of notice of a motion upon an attorney in an action in the same court. In the supreme court, the motion must be made within the judicial district embracing the county where the judgment is to be entered.

STATEMENT OF THE CASE

By an agreement in writing executed by the Petitioner and the Respondent under date of July 31, 1952 (R. 9), Respondent employed the Petitioner to serve as superintendent of Respondent's lithographic and printing plant in North Bennington, Vermont. The employment was to continue for a period of three years commencing August 1, 1952 and terminating July 31, 1955, with compensation for the Petitioner at the annual rate of $15,000. (R. 4-9). The agreement also expressly stipulated that Petitioner should not be entitled to any additional compensation for any service "which he may perform as a member of any managing committee of Employer, or in the event he shall at any time be elected an officer or director of Employer" (R. 7).

This agreement was executed by the parties in the State of New York (R. 13, 20). The Petitioner was then a resident of Westchester County, State of New York; the Respondent was then, and at all times involved in this case has been, a New York Corporation having its principal office at 310 East 45th Street, New York City (R. 4).

The foregoing agreement stipulated that the Petitioner, on or before beginning his employment, should, with his family, take up residence in or near North Bennington, Vermont, where the plant is located (R. 5).

Petitioner undertook his duties pursuant to the agreement on August 1, 1952 and purported to continue in the performance thereof until October 22, 1952. On that date the Respondent discharged Petitioner for alleged derelictions in his duties (R. 9).

On February 10, 1954, the Petitioner commenced an action (a Plea of contract) against the Respondent in the County Court, Bennington County, State of Vermont, charging the Respondent with breach of the foregoing agreement by discharging the Petitioner; caused its goods, chattels or estate to be attached to the value of $31,000 (R. 3) and claimed to recover damages in the amount of $30,000 and just costs (R. 10).

The process was served on the Respondent on February 15, 1954 and a copy of the complaint was received by the Respondent on the same date (R. 2).

On March 5, 1954, Respondent, as defendant in said action, petitioned the United States District Court for the District of Vermont to remove the case from the Vermont court to that court. The petition was based upon the diversity of citizenship of the two parties, the Respondent (defendant) being a New York corporation and the Petitioner (plaintiff) then being a resident of Vermont and the amount in controversy being in excess of the required $3,000. (R. 1-2).

Removal was allowed and on March 10, 1954 the Respondent (as defendant) filed its answer and a counterclaim in the action (R. 10). On April 23, 1954 Petitioner filed a general denial to the Respondent's counter claim (R. 13).

In its answer the Respondent duly invoked an arbitration provision contained in the agreement.

Since the questions before the lower United States courts and now before this Court relate to the revocability of that provision, we interrupt the further chronology in this statement of the case to indentify the arbitration provision, its scope, and the consequences accorded it in the courts below.

In their foregoing agreement of July 31, 1952 the parties included a provision that any dispute arising between them in connection with the container agreement should be settled by arbitration. As stated above, this agreement was executed in the State of New York, by and between two New Yorkers.

The arbitration provision in said agreement provides that (1) any arbitration thereunder shall be in New York, (2) by the American Arbitration Association (a non-profit New York corporation with principal office in New York City), or a panel of its arbitrators, and (3) that such arbitration shall be governed by the rules of said Association and by the New York Arbitration Statute.

This arbitration provision is contained in paragraph "Eleventh" of the Agreement and reads as follows:

> "ELEVENTH: The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matters shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere." (R. 7-8).

A further paragraph, "Fourteenth", of the agreement reads as follows:

> "FOURTEENTH: The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the state of New York and that in any action special proceeding or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted." (R. 9).

The pertinent provisions of the New York Civil Practice Act relating to arbitrations as referred to in the foregoing paragraph "Eleventh" of the agreement are contained in Article 84, New York Civil Practice Act, §1448-1469 and constitute the New York arbitration statute.

The rules and regulations of the American Arbitration Association pertinent to the questions involved in this case, and in effect at all times material in this case are as follows:

1. *Agreement of Parties* — The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever, in the Submission or other written agreement, they have provided for arbitration by the American Arbitration Association or under its Rules. These Rules and any amendment thereof shall apply in the form obtaining at the time the arbitration is initiated.

3. *Administrator* — When parties agree to arbitrate under these Rules or provide for arbitration by the American Arbitration Association and an arbitration is initiated thereunder, they thereby constitute the American Arbitration Association the Administrator of the arbitration. The authority and obligations of the Administrator are limited in the manner prescribed in the agreement of the parties, and in these Rules.

7. *Initiation under an arbitration provision in a contract.* — Any party to a contract containing a clause providing for arbitration by the American Arbitration Association or under its Rules, or any party to a contract containing a general arbitration clause, when the parties have agreed by stipulation or otherwise, to arbitrate under the Rules of the American Arbitration Association, may commence an arbitration in the following manner:

(a) By such party giving written notice to the other party of intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the dispute, the amount involved if any, the remedy sought; and

(b) By filing with the Administrator at any of its offices two copies of said notice, together with two copies of the contract or such parts thereof as relate to the dispute, including the arbitration provisions and the Administrator shall give notice of such filing to the other party.

The party upon whom the demand for arbitration is made may, if he so desires, file an answering statement with the Administrator within seven days after notice from the Administrator, in which event he shall also send a copy of his answer to the other party. If no answer is filed within the stated time, it will be assumed that the claim made is denied. Failure to file an answer shall not operate to delay the arbitration.

After the filing of the claim, and answer if any, if either party desires to make any new or different claim such claim shall be made in writing and filed with the Tribunal Clerk and a copy thereof mailed to the other party who shall have a period of seven days from the date of such mailing within which to file an answer with the Tribunal Clerk. However, after the Arbitrator is appointed no new or different claim may be submitted to him except with the consent of the Arbitrator.

10. *Fixing of locality.* The parties may mutually agree on the locality where the arbitration is to be held. If the locality is not designated in the contract or Submission, or if within seven days from the date of filing the Demand or Submission, the parties do not notify the Administrator of such designation, it shall have power to determine the locality and its decision shall be final and binding. In the event, however, that any party requests that the hearing be held in a specific locale and the other party files no objection thereto, within seven days after notice of the request, the locale shall be that requested by ~~the~~ party.

12. *Appointment from panels.* If the parties have not appointed an Arbitrator and have not provided any other method of appointment, the Arbitrator shall be appointed in the following manner: Immediately after the filing of the Submission or copy of a Demand, as required under Rule III, the Tribunal Clerk shall submit simultaneously

to each party to the dispute, an identical list of names of persons chosen from the Panels. Each party to the dispute shall have seven days from the date of the mailing of such lists in which to examine said list, cross off any names to which he objects and number the remaining names indicating the order of his preference, and return the list to the Tribunal Clerk. When any party or both parties fail to return the list within the time specified all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference if any, the Tribunal Clerk shall invite the acceptance of an Arbitrator to serve. If the parties fail to agree upon any of the persons named or if those named decline or are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator shall have power to make the appointment from other members of the Panels without the submission of any additional lists.

29. *Arbitration in the absence of a party.* Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The Arbitrator shall require the other party to submit such evidence as he may require for the making of an award.

39. *Serving of notices.* Each party to a Submission or other agreement which provides for arbitration under these Rules shall be deemed to have consented and shall consent that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these rules and for any court action in connection therewith or for the entry of judgment on any award made thereunder may be served upon such party (a) by mail addressed to such party or his attorney at his last known address or (b) by personal service, within or without the state wherein the arbitration is to be held (whether such party be within or without the United States of America); provided that reasonable opportunity to be heard with regard thereto has been granted such party.

Resuming the chronology of events in this case, we return to the answer of the Respondent (as defendant) in the United States District Court for the District of Vermont.

The Respondent pleaded matters in justification of its discharge of the Petitioner, and by counterclaim alleged breaches of the agreement by the Petitioner prior to his discharge wherefore it claimed damages resulting therefrom in the amount of $27,000.00 (R. 10).

As a further defense, the Respondent invoked the above quoted arbitration provision in paragraph "Eleventh" of the agreement, setting forth that the Petitioner by commencing this action in the Vermont court committed a default under, and breach of, said agreement to arbitrate and also a breach of paragraph "Fourteenth" of said agreement, quoted above (R. 11).

Respondent further pleaded in said answer that by force of the foregoing arbitration provision in paragraph "Eleventh" of the agreement, the rights of the parties in this action should be governed by the law of the State of New York, and not by the law of the State of Vermont, and that by the pertinent law of the State of New York the Petitioner was not entitled to maintain his action in the United States Court for the District of Vermont (R. 12).

On May 3, 1954 the Respondent by letter mailed to the Petitioner, with copy to the American Arbitration Association, duly demanded arbitration pursuant to the above quoted Rule of the American Arbitration Association and paragraph "Eleventh" of the agreement (R. 14-15).

Thereafter, on May 6, 1954, Respondent also filed in the District Court its petition that the action as brought by the Petitioner against Respondent be stayed pending arbitration of the matters in controversy embraced therein. It based said petition upon the arbitration provision in paragraph "Eleventh" of the agreement, the rules of the American Arbitration Association, and the applicable law of the State of New York relating to said arbitration agreement. It alleged that, under said provision for arbitration and the applicable law of the State of New York, the Petitioner cannot revoke the arbitration provision and maintain this action and that the Respondent is entitled to have arbitration in the State of New York of the issues now in litigation and to have judgment entered upon an award rendered therein; that the law of New York, and not of Vermont, governs in determining the revocability of this arbitration provision in paragraph "Eleventh" of the parties' agreement (R. 14).

The cause came on for hearing in the District Court for Vermont at Brattleboro, Vermont, on June 22, 1954 (R. 16).

At this time Petitioner applied to the court for a temporary injunction to restrain the Respondent from proceeding further with an arbitration in the State of New York which had been duly initiated by the Petitioner's demand for arbitration pursuant to the rules of the American Arbitration Association set out in its letter of May 3, 1954 to the Petitioner as reported above (R. 16).

On July 8, 1954 the District Judge (Ernest W. Gibson) decided the case by denying the Respondent's petition for stay of the action pending arbitration. In avowed exercise of his discretion, he also denied Petitioner's application for the temporary injunction to restrain Respondent from proceeding further with an arbitrator in the State of New York on the ground that the need therefor "has not been shown convincingly" (R. 17).

The District Judge summarized Respondent's contentions in support of its petition for stay of the action pending arbitration as being that it claimed that it was entitled thereto on three independent grounds as follows:

"1. Under the authority of the Federal Arbitration Act, so-called, as set forth in 9 U.S.C.A.;

"2. That the parties have validly contracted to adjust contractual disputes by arbitration;

"3. That a Vermont court would, under like circumstances, stay the present action." (R. 16).

The Court further summarized "that all three of the defendant's contentions are centered in one issue, i.e.: what would a state court of this jurisdiction do were the instant motion before it?" (R. 16-17).

The Judge concluded that this being a diversity case the District Court was bound under *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 "by the substantive law" of the State of Vermont; that there being no statutory law governing arbitration in Vermont, common law rules must apply; that by the common law rule of Vermont an agreement to submit an issue to arbitration is revocable at any time prior to award rendered; and that such being the law of Vermont, defendant's motion for stay of the action must be denied. (R. 17).

Respondent appealed to the United States Court of Appeals, Second Circuit. That court, by its judgment dated January 19, 1955, reversed the ruling of the District Court (R. 25).

In the Court of Appeals the Respondent advanced its case primarily by way of opposition to what appears to have been the overall view of the District Judge, namely, that even though this arbitration provision qualified under Section 3 of the United States Arbitration Act, and even though the action were otherwise subject to stay under that section, the District Court could not stay the action under that section because of the general common law rule of revocability of arbitration agreement obtaining in Vermont; that under *Erie R. R. v. Tompkins*, 304 U.S. 64, the District Court of Vermont must apply the Vermont rule of revocability as the "substantial law" of that state.

The Court of Appeals unanimously ruled that Section 3 of the United States Arbitration Act can be invoked ~~in such~~ a case wherein federal jurisdiction is based on diversity of citizenship of the parties, and that a stay pursuant to that section of that Act "is not 'substantive' within the meaning of *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, and *Guaranty Trust Co. v. York*, 326 U.S. 99." (R. 23)

This Court granted the petition for Certiorari on May 31, 1955 (R. 26).

QUESTIONS PRESENTED.

Two parties, both residents and citizens of the State of New York, entered into and executed, in the State of New York, a written contract whereby the one party employed the other party as superintendent of the first party's manufacturing plant in the State of Vermont.

Said written agreement contained an arbitration provision whereby the parties agreed to submit to arbitration any dispute thereafter arising between them in connection with the container contract. Said arbitration provision further provided that any such arbitration should be had in the State of New York and that it should be governed by the rules of the American Arbitration Association (a non-profit New York corporation with its principal office in New York City) and by the arbitration statute of the State of New York.

An action in contract brought in a Vermont Court by one party against the other involving a dispute arising in connection with the container contract and within the coverage of the arbitration provision was removed by the defendent to the United States District Court for the District of Vermont. Diversity of citizenship of the parties alone supports federal jurisdiction of the case. The following questions are presented:

1. Do *Erie R.R. v. Tompkins*, 304 U.S. 64 and *Guaranty Trust Company v. York*, U.S. 99 require in such case that the revocability of the foregoing arbitration provision shall be judged by any law of the State of Vermont relating to the revocability of arbitration agreements?

2. Is the defendant in the foregoing action (the Respondent herein) entitled to a stay of the action in the United States District Court for the District of Vermont in accord with the arbitration statute of the State of New York?

3. Is the defendant in the foregoing action (the Respondent herein) entitled to a stay of the action in the United States District Court for the District of Vermont in accord with Section 3 of the United States Arbitration Act?

SUMMARY OF ARGUMENT

Argument I ~~The New York~~ Arbitration Act is an integral part of the contract made by these parties, because they made it in New York state, while they were New York residents, and expressly incorporated in the contract the pertinent provisions of the New York Statute. The New York contract is therefore entitled to full faith and credit under Article IV, §1 of the United States Constitution, and a federal district court should honor the contract by staying an action brought in breach thereof.

Argument II The decision of the Court of Appeals in this case that respondent's petition for stay was "not 'substantive'" within the meaning of *Erie R. R. v. Tompkins and Guaranty Trust Co. v. York* was correct because (1) the stay was sanctioned by an act of Congress, and (2) proper identification of this contract invokes Vermont conflict of law doctrines which in turn require a federal district court to honor the New York contract thus identified.

ARGUMENTS

1. ANY COMMON LAW OF VERMONT MAKING COMMON LAW ARBITRATION PROVISIONS REVOCABLE IS IRRELEVANT IN THIS CASE AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT IS BOUND TO GIVE FULL FAITH AND CREDIT TO THE NEW YORK ARBITRATION STATUTE BY STAYING THIS ACTION.

The Petitioner is seeking by the use of *Erie R. R. v. Tompkins*, 304 U. S. 64 and *Guaranty Trust Co. v. York*, 326 U. S. 99, to revive and give new vitality to a common law tradition of dubious origin and waning validity in Anglo-American law. That tradition has it that common law arbitration agreements are revocable in that they can be revoked by either party by due notice before award rendered and in that they cannot be pleaded to defeat an action in court brought in defiance of them. This is the tradition which the learned District Judge Hough, after searching for its validity, concluded some forty years ago, stands rather "upon the antiquity of the rule than upon its excellence or reason." In so concluding his research concerning it he observed: "It has never been denied that the hostility of English-speaking courts to arbitration contracts probably originated (as Lord Campbell said in *Scott v. Avery*, 4 H. L. Cas. 811) — 'in the contests of the courts of ancient times for extension of jurisdiction — all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.'

"A more unworthy genesis cannot be imagined. Since (at the latest) the time of Lord Kenyon, it has been customary to stand rather upon the antiquity of the rule than upon its excellence or reason: 'It is not necessary to say how this point ought to have been determined if it were res integra — it having been decided again and again,' etc. Per Kenyon J., in *Thompson v. Charnock*, 8 T. R. 139." *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co. Limited* (D. Ct. S. D. New York, 1915) 222 Fed. 1006, 1007-1008).

It is the same tradition which Judge Cardozo challenged in similar vein in 1921 in his opinion for the New York Court of Appeals which unanimously sustained the New York Arbitration Law of 1920 against various attacks on its constitutionality.

"It was followed," he wrote, "with frequent protest, in deference to early precedents. Its hold upon the common law was hesitating and feeble. We are now asked to declare it so imbedded in the very foundations of our jurisprudence and the structure of our courts that nothing less than amendment of the Constitution is competent to change it. We will not go so far. The judges might have changed the rule themselves if they had abandoned some early precedents, as at times they seemed inclined to do. They might have whittled it down to nothing as was done indeed in England by distinctions between promises that are collateral and those that are conditions." *Berkowitz v. Arbib & Howlberg*, 230 N. Y. 261, 276 (1921).

While we do not consider this common law tradition of revocability of common law arbitration agreements of any controlling significance in this case for reasons indicated below, we will take note of how feeble and tenuous is its hold upon the common law of Vermont.

We have been able to find no other Vermont cases beyond those cited by the Petitioner on the matter. Our reading of those cases leaves us in doubt that one of them, *Welch v. Miller*, 70 Vt. 108 (1900), touches upon the matter.

All of the remaining Vermont cases involved an agreement of submission of a difference over a commercial matter then existing between the parties; none involved a provision in a more general container contract to arbitrate disputes arising between the parties in the future in connection with that contract.

These cases related more or less to the effect of a notice of revocation of the particular submission agreement. In all but one of the cases it appears to have been assumed by the Court that the given submission was revocable by notice before award rendered; in the one, *Marsh v. Packer*, 20 Vt. 198, the Court observed that "counsel for both sides" admitted revocability by the notice. In none of these Vermont cases, as we understand them, was the question of common law revocability involved more than incidentally and in a process of reasoning leading to the resolution of another and precise issue in the case. In none of them was the tradition challenged; in none of them did the Court advance any reason to support common law revocability — not even its antiquity. The matter passed unconsidered. The latest comment of the Court is that quoted by the Petitioner in his brief from *Mead's Administratrix v. Owen*, 83 Vt. 132, 135. That was in 1910.

On this record, we take the position that the Supreme Court of Vermont should not be deemed committed to common law revocability of common law arbitration agreements. It seems clear that neither by statute nor by decision of that Court has common law revocability of common law arbitration agreements become imbedded in the jurisdisprudence or public policy of the State of Vermont. Certainly it may be urged that Vermont has manifested "no real antagonism against" such arbitration provisions. At the very least it is doubtful what is the common law of Vermont in 1955 with respect to this matter.

We have followed this line of inquiry to this conclusion because it seems to be the purpose of the Petitioner to emphasize that common law revocability of common law arbitration agreements has become imbedded in the jurisprudence and policy of that State. This view seems to have been accepted in the decision in the District Court.

We turn from further inquiry along this line because we maintain that whatever may be the common law of Vermont with respect to revocability of common law agreements it does not govern in this case.

We base our position in this connection on the ground that the arbitration provision in this case was not born of the common law, nor has it ever become subject to the common law traditions of revocability or non-enforceability. Instead it was born under the New York arbitration statute and upon the making of the provision by these parties and at all times since it has been subject to and sustained by that statute which makes it irrevocable and enforceable contrary in all particulars to any common law revocability and non-enforceability.

The arbitration provision involved in this case is contained in a contract in writing. It was signed and executed by the Petitioner and the Respondent in the State of New York. Both parties were then residents and citizens of the State of New York. Upon its execution by these parties it qualified under the New York arbitration statute as a contract "to settle by arbitration a controversy thereafter arising between them" as provided in N.Y.C.P.A. §1448; it was "in writing" pursuant to N.Y.C.P.A. §1449. By the same token it then and there became subject to §1448 declaring that it "shall be valid, enforceable and irrevocable." Thereupon, also, the statutory remedies of the statute (motion proceedings) became effective and available to the parties to make the provision "valid, enforceable and irrevocable." These statutory remedies are severally designed precisely to overcome and displace all instances of common law revocability and common law non-enforceability of arbitration agreements.

Thus, §1451 nullifies common law revocability by action of this arbitration provision. If the Petitioner had brought his action against the Respondent in a court of the State of New York and the Respondent had applied for stay of action pending arbitration as it did in the District Court, the New York court would have been bound to grant it pursuant to §1451. By that section the court "shall", upon the application, "stay all proceedings in the action", until arbitration is ~~had~~ "in accordance with the terms" of the arbitration contract.

Common law non-enforceability is displaced with respect to this arbitration provision by §1450; specific enforcement by statutory motion is provided. By this section of the statute the party aggrieved (the Respondent) by the failure, neglect or refusal of the other party (the Petitioner) to go forward in compliance with such arbitration provision can, upon petition to the Supreme Court of the State of New York, obtain an injunctional order directing the recalcitrant party to comply with the arbitration provision and carry out his part of the arbitration agreement.

By way of further specific enforcement of the agreement §1453 enables the aggrieved party, when need arises to establish or restore the arbitral board, to apply to and obtain from the Supreme Court of the State of New York, the appointment of arbitrators or an umpire.

The one or more so appointed by the Court "shall act under the said contract or submission with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided, the arbitration shall be by a single arbitrator."

These are the remedies provided by the statute whereby the courts of the State of New York, and particularly the Supreme Court of the State, can be called upon to fulfill the mandate of the statute that arbitration agreements like the one involved in this case "shall be valid, enforceable and irrevocable."

When an award shall have been rendered in an arbitration under this arbitration provision, the successful party may, by the statutory motion of §1461, apply to the Supreme Court of the State of New York to have it confirmed; "and thereupon the court must grant such an order" unless the award is subject to vacation, modification, correction or defeat for one of the causes provided in other sections of the statute. By §1464 upon granting the order confirming the award judgment may be entered conforming thereto and by §1466 the judgment so entered "has the same force and effect, in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered."

In view of the foregoing sections of the New York arbitration statute and their application to the arbitration now under consideration we identify it as a New York statutory arbitration provision. From its making by the parties it has been "valid, enforceable and irrevocable" in disregard of any common law of revocability or non-enforceability and the statute provides the precise statutory remedies to make it so.

We will next emphasize that there is no special fact or circumstance attending this arbitration provision which at any time displaces the applicability of the New York arbitration statute or which curtails or forecloses its remedies.

This, while the contract containing this arbitration provision contemplated, indeed, expressly provided, that the Petitioner should move to Vermont and carry out at least the major part of his duties in Vermont, this stipulation for this out-of-state performance of the container contract did not displace the applicability of the New York arbitration statute nor curtail its remedies.

The New York courts have so decided. To verify this we will start with *Marchant v. Mead-Morrison Co.*, 252 N.Y. 284, 169 N.E. 386, decided by the New York Court of Appeals in 1929. In that case a Maine corporation contracted to sell and deliver tractors to a New York corporation. The contract was executed in Massachusetts. The tractors were to be manufactured and delivered in Massachusetts. This contract contained the following arbitration clause:

> "If for any reason any controversy or difference of opinion shall arise as to the construction of the terms and conditions of this contract, or as to its performance, it is mutually agreed that the matter in dispute shall be settled by arbitration, each party to select an arbitrator, and the two so selected to select a third, and the decision of the majority of such arbitrators given after full hearing and consideration of the matter in controversy shall be final and binding upon the parties, and a condition precedent to any suit upon or by reason of any such controversy or difference. The cost of such arbitration shall be paid by the party against whom the majority of such arbitrators render such decision."

Dispute arose between the parties. Each party appointed one arbitrator, but the two so appointed, and apparently the parties likewise, were unable to agree upon the third.

The Court of Appeals was confronted with the following question: Did the Supreme Court, or judge thereof, have power under section 4 of the New York law (C. P. A. §1452) to appoint the third arbitrator and direct the parties to proceed with an arbitration? The appointment had been made, and the order to proceed had been granted upon the petition of the buyer, the seller having appeared generally to contest the granting of the application.

The seller attacked the legality of the order upon two grounds. As a first point it argued that the arbitration provision, as quoted above, provided for arbitration in Massachusetts and nowhere else, and that therefore the New York court had no power to act under section 4 (C.P.A. §1452) of the New York law. This objection was denied. Chief Judge Cardozo observed upon the matter as follows:

> "The order, it is said, is void, because the parties to the contract in agreeing to arbitrate their difference had in view an arbitration in Massachusetts, and not performance somewhere else. Whether this was their meaning was, however, a question of construction, to be determined like any other question of construction by the judge receiving the petition. Jurisdiction was not dependent upon his determining it correctly. *We must distinguish between the place of performance in respect of manufacture and delivery and the place of performance for the settlement of differences. The contract was to be performed in Massachusetts to the extent that the things to be sold were to be there manufactured and delivered. The conclusion does not follow of necessity that the remedy prescribed for the settlement of differences was to be sought in the same forum.* At common law, general contracts of arbitration, though not specifically enforceable, were not held to be illegal. This is seen from the fact that in case they were broken there might be a recovery of damages (*Matter of Berkovitz v. Arbib & Houlberg*, 230 N.Y. 261, 271; *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 121). The statute of New York does not bring the contract into being, but adds a new implement, the remedy of specific performance, for its more effectual enforcement. *This remedy may lawfully be extended to contracts of manufacture made in Massachusetts and there to be performed, unless it is one of the terms of the arbitration clause, implied if not express, that the arbitration shall proceed in a particular locality. Express restriction there is none in the contract now before us. Whether one is to be implied is a question of intention to be determined in the light of context and occasion. That is what was done. The court in the discharge of its judicial function was called upon to declare the implications of the promise. We do not say at this time that the determination was free from error. Enough for present purposes that it is not to be ignored as void."* (Italics supplied).

The second objection advanced by the seller was as follows: That the New York court had no power to appoint the third arbitrator for, by doing so, it nullified the contract to arbitrate as made by the parties in Massachusetts which expressly provided that the two arbitrators nominated by the parties should select the third. This objection also was overruled.

We turn next to *In the Matter of Gantt (Hurtado & C I A)* decided by the New York Court of Appeals in 1948, 297 N.Y. 433, 79 N.E. 2d. 815. The situation of the parties and the terms of their arbitration provision varied from those in the Marchant case as follows: (1) Both parties (rather than one of them) were at all times nonresidents of the State of New York; (2) Their arbitration provision called for arbitration in New York.

Thus, Gantt, a resident of North Carolina, entered into a contract with Hurtado, a Nicaraguan partnership, to buy tropical woods, shipments by Hurtado to be f.o.b. Nicaraguan ports to Gantt in North Carolina. This contract was executed by the parties in North Carolina. Contained in this contract was the following arbitration provision: "Any controversy or claims arising out of or relating to this contract or the breach thereof shall be settled by arbitration in accordance with the rules of the Inter-American Commercial Arbitration Commission. This agreement shall be enforceable and judgment upon any award rendered by the arbitrators or a majority of them may be entered in any Court having jurisdiction. The arbitration shall be held in New York, N.Y."

Dispute arose between the parties. Hurtado demanded arbitration. Gantt did not reply to the demand but petitioned the Supreme Court of New York to *stay the arbitration.* He urged that by the law of North Carolina the arbitration provision was "void" and therefore he could not be required to arbitrate anywhere. The trial court and the Court of Appeals found that North Carolina decisions had ruled that other arbitration provisions (not this one) were revocable and nonenforceable according to common law tradition. But this did not mean that they were "void". In the trial court, in the Appellate Division and in the New York Court of Appeals Gantt's petition was denied.

Said the Court of Appeals: "Having thus found that the arbitration treaty we are passing on was not void but unenforceable only, at the place where made, we turn to the question of whether it may be compulsorily enforced by the courts of New York. *The place of performance of the arbitration section, though not other parts of the September agreement, was to be in New York. The New York statute (Civ. Prac. Act, art. 84) provides complete compulsion and full enforcement, as to such promises to arbitrate future-arising disputes.*" (P. 438). (Italics supplied).

And to Gantt's further argument that the refusal of this application for the stay of arbitration would deprive him of the privileges and immunities to which he was entitled under Section 2 of Article IV of the United States Constitution and that to allow the arbitration to proceed in New York would be a denial of full faith and credit to the laws of North Carolina, the Court of Appeals responded as follows: "The pertinent North Carolina law, as we have seen, goes only so far as to deny enforceability in its courts to such an arbitration clause, while these parties covenanted that they would, in case of dispute, go into New York State and there submit to an arbitration under the New York statutes; the New York statutes fully enforce such agreements and provide court machinery for compelling the parties to go through with their own arrangements for the settlement of their differences in a private tribunal of their own selection, rather than in a court of law." (P. 440).

These parties "*solemnly promised to arbitrate their controversies in New York*," said the Court, "*and by case and statute the law of New York then was, and now is, that such an agreement is 'a consent of the parties thereto to the jurisdiction of the Supreme Court of this state to enforce such contract or submission'* (Civ. Prac. Act. §1450 x x x)". (P. 439). (Italics supplied).

It is clear, we submit, that the arbitration provision in the present case is tied in more with the State of New York and its arbitration statute — and expressly so — than were the provisions in the foregoing cases. In this connection, we will note first the fact that both the Respondent and Petitioner were New York citizens and residents when they entered into their agreement. In such a case, *and with no express tie-in with the New York statute, the* New York courts have granted the same order to proceed with arbitration as did the Court in the Marchant case.

Such was the ruling of the New York courts in *P. Beiersdorf & Co., Inc. v. Duke Laboratories, Inc.* (Sup. Ct. Sp. Term, New York County, Pt. 1, 1949) 94 N.Y.S. 2d. 18; aff'd. without opinion, 277 App. Div. 768, 97 N.Y.S 2d. 538 (1950); aff'd. without opinion, 301 N.Y. 707, 95 N.E. 2d. 55 (1950).

In this case two New York corporations with offices in New York entered into a commercial contract in the State of New York in 1936. It related to the distribution by one party of the products manufactured by the other. Their contract contained the following arbitration provision: "In case of any difference of opinion between the parties as to any matter arising out of this agreement, such difference shall be determined by a person mutually agreeable to both sides or by usual arbitration methods, but such arbitrators shall have no power, right or authority to do any act or make any decision, which will draw into question the sole, absolute and complete ownership by Beiersdorf of its trade marks."

After the parties had executed their contract and entered upon its performance both of them moved their offices and plants to the State of Connecticut.

Thereafter dispute arose between the parties. Beiersdorf moved under the New York arbitration statute, §1450, in the New York Supreme Court for an order that Duke Laboratories proceed with arbitration pursuant to the parties' foregoing arbitration provision. Duke appeared and made a cross-motion to dismiss the petition, or, in the alternative, to stay arbitration pending determination of an action then pending between the parties in the State of Connecticut.

With respect to this alternative part of Duke's motion, it is to be noted that prior to Beiersdorf's motion for an order to require Duke to arbitrate, Duke had begun a civil action against Beiersdorf in the Superior Court of Fairfield County in Connecticut to have their foregoing contract of 1936 declared invalid on the ground that the parties had intended it to be only a "political" document; that the parties never intended that it should be binding.

On Beiersdorf's foregoing application for the order to proceed with arbitration, the judge at Trial Term of the Supreme Court of New York heard the parties, including Duke's claim as to the invalidity of the contract. Finding no substantial evidence in support of Duke's contention as to the inability of the contract, the Court ordered the parties to proceed with arbitration and denied Duke's cross motion to dismiss and the alternative part thereof, which, to stay arbitration pending the Connecticut action.

Said the Judge in so ruling: "*The contract of 1936 was made in this state by New York corporations and therefore is a consent to the jurisdiction of this court to enforce the contract.* Civil Practice Act, §1450. The only question that may be raised preliminarily is as to the making of the contract and a substantial issue must be raised as to that question to prevent the court from forthwith directing the parties to proceed to arbitration." (P. 21). (Italics supplied).

As indicated above, after taking account of Duke's claim that the parties did not intend their contract to be binding on them, but finding no facts to support it, the Court concluded: "In the light of these circumstances, no substantial issue has been raised as to the making of the contract and the parties are directed to proceed to arbitration." (P. 22). (All of this pursuant to §1450.)

And with respect to the Connecticut litigation pending between the parties, the Court further observed: "In so holding, the court is mindful of the Connecticut action. However, that action has two objects in view: one, to declare the contract invalid *which this court by this decision has determined otherwise; and, as pointed out above, this court has jurisdiction of that question, by consent of the parties.* Secondly, it raises the question of ownership of the trademarks. There is nothing inconsistent in the arbitration and the Connecticut action on these grounds. In fact such separate proceedings are necessary because the parties so desired it, as evidenced by the contract [to arbitrate]. (P. 22). (Italics supplied).

In view of the foregoing New York decisions, we submit that there can be no doubt that the New York courts would accord the foregoing statutory remedies of specific enforcement of the arbitration provision in this case both by appointing one or more arbitrators or an umpire were it necessary to establish or maintain the arbitral board and by ordering the recalcitrant party (the Petitioner) to comply with and carry out his part of the agreement to arbitrate (rather than sue in court in breach thereof as he did in Vermont). And by *Beiersdorf v. Duke Laboratories*, these remedies would be accorded notwithstanding that the Petitioner's Vermont action were then pending.

It will now be emphasized that the arbitration provision and its container contract in this case are tied in with the State of New York and its arbitration statute more fully and expressly than were those either in the Marchant and Gantt cases or in the Beiersdorf case. The container contract in the present case was executed by New Yorkers in the State of New York. The arbitration provision expressly stipulates that arbitration shall be by the American Arbitration Association, or arbitrators designated by it, and that the arbitration shall be governed by the rules of that Association and the New York arbitration statute. The American Arbitration Association was at the time of this agreement and is now a New York non-profit corporation with its offices and arbitration tribunals in New York City.

It seems very clear that under this arbitration provision the New York courts would recognize and accord to this Respondent all the rights and privileges to proceed with arbitration and all of the enforcement remedies under the arbitration statute that were accorded in the foregoing cases.

It remains to note, however, that in the foregoing three cases both parties were voluntarily before the New York courts in the proceedings involved therein. We take note of that aspect of those cases to pose the following problem with respect to the present case: The Petitioner did as he agreed to do in the parties' container contract in that he moved to Vermont to undertake his principal duties under the contract; he became, it appears, a resident and citizen of Vermont. Suppose now, that at all times involved in this case he shall have remained a resident and citizen of Vermont, and that he shall not at any time come within the State of New York. Does such continued absence defeat Respondent's rights under the arbitration provision and the New York arbitration statute? Are its enforcement remedies foreclosed or curtailed by Petitioner's departure and continued absence from New York?

It is clear under the New York decisions that both of these questions are to be answered in the negative.

We cite the foregoing Beiersdorf case for the New York law that when the two New Yorkers in this case executed their contract in New York they then and thereby consented to the jurisdiction of the Supreme Court to accord the enforcement remedies of the New York arbitration statute to either party against the other. It seems equally clear by that case that the subsequent departure of Petitioner to Vermont and his continued stay outside New York did not affect his prior consent or the continuance of its efficacy.

Rule 39 of the American Arbitration Association also deserves attention at this point. By incorporating it in their arbitration provision each party "shall be deemed to have consented and shall consent *that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration* under these rules *and for any court action in connection therewith or for the entry of judgment on any award made thereunder may be served upon such party* (a) *by mail addressed to such party or his attorney at his last known address* x x x, provided that reasonable opportunity to be heard with regard thereto has been granted such party." (Italics supplied).

With this rule constituted a part of these parties' arbitration provision it is made especially clear that reasonable notice by mail to the Petitioner as provided in the rule is valid in New York and that a petition, upon such notice to Petitioner, by Respondent to the Supreme Court of the State of New York under the arbitration statute for the appointment of an arbitrator, if need therefor arises and for a general order to proceed to arbitration will be granted — the same orders as were granted in the Marchant case.

Matter of Application of *Heyman, Inc. And Cole*, 242 App. Div. 362, 275 N.Y.S. 23 (1934);

Matter of the Arbitration between *Galban Lobo Co. And Haytian American Sugar Co.*, 271 App. Div. 310, 65 N.Y.S. 2d (1946);

Matter of Arbitration between *Liberty Country Wear, Inc. And Riordan Fabrics Co.* (Sup. Ct., Sp. Term, New York County, 1950) 197 Misc. 581, 96 N.Y.S. 2d. 134;

Prosperity Co. v. American Laundry Machinery Co., 271 App. Div. 622, 67 N.Y.S. 2d. 669; aff'd. without opinion 297 N.Y. 486, 74 N.E. 2d. 188 (1947).

The Supreme Court of California has held likewise (sustaining an order to proceed to arbitration) under the California arbitration statute which is of the same pattern as the New York arbitration statute. *Frey & Horgan Corp. v. Superior Court*, 5 Cal. 2d. 401 (1936).

But suppose that the Petitioner continues outside the State of New York and neglects or refuses to participate in the arbitration? The parties' arbitration provision and the New York arbitration statute give the Respondent right to an arbitration and an award.

An arbitrator being duly appointed by the American Arbitration Association pursuant to its Rule 12 (or by the Supreme Court of New York in event it should default in doing so) then, under Rule 29, the arbitrator may proceed ex parte (that is, in the absence of Petitioner). After due notice of the time and place of the hearing given by the arbitrator in compliance with Rule 39 above he will proceed at the time and place covered in the notice to hear the Respondent's evidence and render an award.

If the award is favorable to Respondent it can, upon due notice by mail to the Petitioner pursuant to Rule 39 above, have it confirmed and judgment entered thereon in the Supreme Court of New York — all as provided in the New York arbitration statute (§1461, 1464, 1466, C.P.A.).

Matter of Arbitration between *Bradford Woolen Corp. and Freedman* (Sup. Ct. Sp. Term, N.Y. County, 1947) 189 Misc. 242, 71 N.Y.S. 2d. 257;

Prosperity Co. v. American Laundry Machinery Co., 271 App. Div. 622, 67 N.Y.S. 2d. 669, aff'd. without opinion, 297 N.Y. 486, 74 N.E. 2d. 188 (1947);

Matter of Arbitration between *Liberty Country Wear Inc. And Riordan Fabrics Co.* (Sup. Ct. Sp. Term New York County, 1950) 197 Misc. 581, 96 N.Y.S. 2d. 134;

Republic Francaise v. Cellosilk Mfg. Co. (Sup. Ct. Sp. Term, N.Y. County, 1953) 124 N.Y.S. 2d. 93 (1953).

And such judgment will be accorded full faith and credit in jurisdictions outside the State of New York.

Mulcahy v. Whitehill (D.C.D. Mass. 1943) 48 F. Supp. 917;

Marvlo Fabrics v. Jarus (U.S.D.C.W.D. Mo. W.D. 1949);

Ripley Fabrics Corp. v. Hymen (D.C.N.D. Ill. E.D. 1950) 91 F. Supp. 1007;

Hirsch Fabrics Corp. v. Southern Athletic Co. (D.C.E.D. Tenn. N.D. 1951) 98 F. Supp. 436;

Kentucky River Mills v. Jackson (U.S.C.A. 6, 1953) 206 F2d. 111;

Tanbro Fabrics Corp. v. Morton Hymen, 341 Ill. App. 396, 94 N.E. 2d. 93 (1950).

See also, *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931) and *Fauntleroy v. Lum*, 210 U.S. 230, 28 Sup. Ct. 641.

It will be noted in both groups of cases last cited above that the orders, awards and judgments were sustained although in none of them was the parties' arbitration provision tied in with the State of New York in one important particular that obtains in the present case. In this case, as distinguished from them, both parties were citizens and residents of the State of New York when they executed their agreement, and they did so in New York. The Beiersdorf case, reviewed above, teaches that, by reason of that further tie-in, even the more assured are the Respondent's rights to those orders, awards and judgments with respect to the arbitration provision in this case.

It remains to note *Lowengrub et al v. Meislin*, 376 Pa. 463, 103 A2d. 405 (1954). Articles of Partnership entered into the State of New York by New Yorkers carried a provision for arbitration of disputes arising between them by submitting the same "to the American Arbitration Association in accordance with the rules and regulations of the said American Arbitration Association then obtaining, and in accordance with the laws of the State of New York." One of the partners instituted a bill for accounting against the other partners in Pennsylvania. The defendants petitioned for stay of the action quite the same as did this Respondent in the District Court. The arbitration provision did not qualify under the Pennsylvania arbitration statute. Held, that the petition should be granted in accord with the rights of the defendants under the New York arbitration statute.

We submit that the District Court should likewise have granted the Respondent's petition for the stay in this case.

Indeed, the Respondent lays claim to the stay for which it petitioned in the District by virtue of the New York arbitration statute and the obligation of the District Court and of the Vermont court to accord that statute Full Faith and Credit as required by Article IV, §1 of the United States Constitution. These parties expressly invoked the New York arbitration statute in their arbitration provision. Upon their making that agreement it thereby and thereupon became "valid, enforceable and irrevocable" by the very words of the New York arbitration statute (§1449). The rights and remedies provided in that statute thereby and thereupon became an integral part of that agreement at home (in New York) and abroad (including in Vermont). Included among those rights and remedies is the right to stay of this action as brought in the Vermont court and removed to the District Court. The New York arbitration statute is precise and specific in making this arbitration provision irrevocable by entitling the Respondent to the stay of Petitioner's action (§1451). We claim this right to stay on "a substantive right conferred by a statute of New York." The Respondent claims its right of stay under that statute and under Article IV, §1 of the United States Constitution and the decisions of this Court in *John Hancock Insurance Co. v. Yates*, 299 U.S. 178 and Order of *Travelers v. Wolfe*, 331 U.S. 586.

In the above cited cases the State courts and lower Federal courts already have established many of the realities of this claim. By sustaining the claim of the Respondent to the stay under this arbitration provision as a matter of right under the New York arbitration statute and the Constitution of the United States this Court will stabilize such arbitration provisions and accord them uniformity of validity and enforceability which is so clearly desirable in commercial contracts. It will foreclose further litigations like that involved in this case; it will obviate untoward races to arbitration and litigation and it will obviate various conflicts arising between proceedings in arbitration and in court actions and with respect to their respective awards and judgments.

We also point out finally that the Petitioner, by bringing his action in the Vermont court and in seeking to maintain it in the District Court, is bent upon a deliberate breach and repudiation of his agreements to arbitrate. The intent of that agreement or its making he cannot deny; nor does he pretend any justification for his actions. That repudiation of the arbitral process and substitution of the process of civil litigation is irreparable — that is a complete destruction of the contract to arbitrate—this Court well knows. It took account of substantial differences between the two processes of adjusting controversies in *Wilko v. Swan*, 346 U.S. 427 (pp. 436-437).

II. THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE RESPONDENT'S PETITION FOR STAY IN THIS CASE IS "NOT 'SUBSTANTIVE'" FOR PURPOSES OF *ERIE R. CO. V. TOMPKINS*, 304 U. S. 64, *AND GUARANTY COMPANY V. YORK*, 326 U. S. 599.

We identify the Court's characterization of the Respondent's petition for stay of the action as being "not 'substantive'" as referring to a going dichotomy involving the *Erie* and *York* cases. By that dichotomy matters "substantive" may, it appears, be posed in distinction to it, when federal jurisdiction rests only on diversity of citizenship, to follow the law of the state in which the District Court is sitting — matters "procedural". District Courts are required, as we understand that this is true in matters "substantive" but not, it is said, in matters 'procedural". (Or, to put the matter in another way these matters of local, state law while, under the *Erie* and *York* cases, must be followed by the District Court may be "substantive", other matters not so required to be followed may be said to be "procedural"). At all events, it is clear that the Court of Appeals decided that the *Erie* and *York* cases should not, and did not control this Respondent's petition in this case — and that was the issue in the case; that was the issue decident.

We believe that this decision should be sustained in this Court by its identification of the rights which petitioner has attempted to assert in the removed action, and which respondent has challenged with its petition for stay of proceedings in the removed action. We believe that this identification should point out that petitioner was asserting in his common law declaration rights which he never had under the contract upon which he declared. The rights which petitioner had under the contract here were not created by Vermont law, but by the law of New York, the law of the place where the agreement was made, the place where the arbitration agreement was to be carried out, the law which the parties by express agreement agreed should govern their rights in the event of dispute. We have demonstrated in Argument I how completely these rights differed from the rights which were created under Vermont law in the common law submissions which were the subject matter of the cases which petitioner has urged as controlling local law in this case. The New York statutes and cases leave it clear that the effect of this agreement was to substitute a prospective arbitration award for the traditional remedies for breach, when, as and if a situation should develop which would otherwise have caused petitioner's traditional remedies to come into play. We understand that this Court has made such an identification in *Wilko v. Swan*, [illegible]6 U.S. 427, where it decided that substitution of a prospective arbitral award for rights conferred by Congress was so substantial a modification of the rights conferred as to constitute a waiver of them. Here we think the same identification is necessary to discovery of what applicable local law is. Before continuing discussion of the reasons which lead us to conclude that the decision is one for this court to make, we interrupt to consider the treatment of Section 3 of the United States Arbitration Act which the lower federal courts have adopted since the decision of *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 499 (1935). It has been concluded in each of the five circuits that have considered it,[1] that Section 3 is an excerise of the Congressional power to regulate the procedure of the federal courts as provided in Article III, of the Constitution. So viewed, Section 3 of the Arbitration Act is identified as "merely a stay order of a kind long familiar in common law equity and admiralty actions," and that in exercise of this jurisdiction conferred, "it is our obligation to shake off the old judicial hostility to arbitration." See *Kulukundis Shipping Co., v. Amtorg Trading Corp.*, (2d Cir. 1942) 126 F. 2d. 978, 985, 987. There courts have also decided that an "issue referable to arbitration" under Section 3 may arise even though the container contract may not be a "maritime transaction" or "transaction involving commerce".[2]

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[1] See cases from other circuits as follows: *Donahue v. Susquehanna Co.*, 138 F. 2d. 3 (3d. Cir. 1943) at pages 5-6; *Agostini Bros. Bldg. Corp. v. United States*, 142 F. 2d. 854, (4th Cir. 1944); *Wilson & Co. v. Fremont Cake & Meal Co.*, 77 F. Supp. 364 (D. Neb. 1948); *Pioneer Trust & Sav. Bank v. Screw Machine Products* 73 F. Supp. 578 (E.D. Wis. 1947).

[2] The genesis of this view seems to be Judge Learned Hand's avowed dictum in *Shanferoke Coal & Supply Corp., v. Westchester Service*

Granted these premises ~~it has~~ followed that a district court (even if it attribute to local law all of the traditional consequences of invalidity, revocability and unenforceability) is not bound to recognize in this climate of judicial hostility a rule of decision for the federal courts.[3]

Corp., 70 F. 2d. 297, 298-299 (2d. Cir. 1934) concluding that such a result was indicated by supposed deliberate changes in the text of the federal act from that of the New York Act, after which the former was copied. Judge Goodrich in *Donahue v. Susquehanna Collieries Co.*, 138 F. 2d. 3, 406 (3d Cir. 1943) thought there was a significant difference between the subject matter of legislation in Section 3 and Section 2, and that the "generality of the language" in Section 3 did not suggest that its application was to be confined to cases falling within Section 2. Judge Parker in *Agostini Bros. Bldg. Corp., v. United States*, 142 F. 2d. 854, 855-856 (4th Cir. 1944) agreed and added to this by pointing out changes in the Senate Report of the proposed legislation changes which he thought tended to confirm the view that Congress did not intend to limit Section 3 to the subject matter of Section 2. These conclusions have not escaped criticism. See: Sturges and Murphy, "Arbitration Under the United States Arbitration Act" 17 Law & Contemp. Prob. 580, 609 (1952), pointing out that "the Act invites the reading of its sections into more correlated relationship."

[3] In accord with the opinion so holding of the Court of Appeals in this case is *Parry v. Bache*, 125 D. 2d. 493 (5th Cir. 1942). ~~And 342 U.S. 395, at page 363~~. It is recognized in *Angel v. Bullington*, 330 U.S. 183, 192, that where a federal right is claimed "the limitations upon the courts of a State do not control a federal court sitting in the State."

These decisions, honoring as they do the arbitration agreement in many[4] of the cases which come into federal court, have displaced the earlier recognition of the enforceability rule as the "general law" in federal courts, as to which, see: *California Prune & Apricot Growers Ass'n. v. Catz American Co.*, 60 F. 2d. 788 (9th Cir. 1932), *Lappe v. Wilcox* 14 F. 2d. 861 (N.D. N.Y. 1926), and *Rae v. Luzerne County*, 58 F. 2d. 829 (N. D. Pa. 1932). The contracts involved in these cases occupied a position then supposed to be outside the ambit of the federal act and the courts were left to apply revocability and unenforceability as the rule of decision in the federal courts, notwithstanding the agreement would be honored in state court. It is our contention that, independently of the federal statutes, these cases become obsolete with *Erie v. Tompkins*; that this court ought to interpret the arbitration agreement here involved as suspending the rights of the parties to compliance with the container contract, as those rights are traditionally conceived, and substituting the right to the prospective arbitration award.

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[4] Despite the view referred to in note 2, supra, there remains a substantial number of cases which are subject to the exclusion of certain contracts of employment contained in Section 1 of the United States Arbitration Act. Judge Goodrich originally advanced the view that the exclusion did not relate to Section 3 (see *Donahue v. Susquehanna Collieries Co.*, 138 F. 2d. 3 (3d Cir. 1943) but this has now been repudiated in *Amalgamated Ass'n. etc. v. Pennsylvania Greyhound Lines*, 192 F. 2d. 310 (3d Cir. 1951). In the instant case Judge Frank found the decisions of the California courts "most persuasive" in concluding that the contract of employment here involved was not within the classes of such contracts enumerated in and excluded from the federal Statute. Cases in which the exclusion provision has been found to require defeat of the arbitration agreement include: *Gatliff Coal Co. v. Cox*, 142 F. 2d. 876 (6th Cir. 1944); *Tenney Engineering v. U. E. R. & M. Wkrs.*, 207 F. 2d. 450 (3d Cir. 1953); *International Union v. Colonial Hardwood Floor Co.* (4th Cir. 1948) 168 F. 2d. 33.

So if we misconceive the Court's judgment as to the applicability of Art. IV, Section 1 of the United States Constitution, as contended for in Argument I, this identification would still (even in the absence of federal statute controlling) be decisive in a case such as this. Should this case stand in that posture then *Klaxon v. Stentor Electric Co.*, 313 U. S. 487, makes the conflict of laws doctrine of Vermont the applicable rule of decision.

Woodrow v. O'Conner, 28 Vt. 776 would seem to indicate that the lex locus establishes the rights of the parties to an arbitration agreement. *Vermont Mutual Fire Ins. Co. v. Van Dyke*, 105 Vt. 257 at page 259, and *Smith v. Anderson*, 70 Vt. 424, at page 426 indicate that the parties may eliminate doubt as to law governing a contract by their express stipulation on this point. And *Brown v. Perry*, 104 Vt. should leave it entirely clear that a Vermont court would not decline to recognize respondent's asserted rights for the reason that the New York agreement offended the public policy of Vermont. Again, granted the basic identification we urge, it becomes wholly immaterial whether Vermont would in a case involving a purely domestic agreement depart from its early cases, or whether a Vermont court would, when dealing with this particular agreement (or another like it) extend to respondent the same range of enforcement available in New York state. If the *York* case makes it pertinent to inquire as to precisely how a Vermont Court could be expected to honor the agreement to arbitrate, we submit that *Weiner et al. v. Prudential Ins. Co.*, 110 Vt. 22, at pages 26-27, and in cases cited, suggests that it would do so by staying the plaintiff's action pending determination of the issues in an arbitration proceeding.

In closing it is appropriate to take issue with petitioner in his claim (as we understand it to be) that *Erie v. Tompkins* is to be read as a restriction upon the power of Congress to legislate to the extent, at least, that a litigant in federal court must first show that he was entitled to analogous relief in a state court before he could invoke the federal arbitration act. As noted above, we contend here that the Court of Appeals correctly decided in this case that such was not the law. And we understand *Dice v. Akron & Youngstown R. Co.*, 342 U. S. 395 as saying that state procedures are irrelevant where the mode of trial "is a goodly portion of the relief Congress has afforded." The claim that federal arbitration act is an excercise of valid congressional power is not, we feel, in conflict with the claim we also make that the rights conferred by an arbitration agreement, such as is here involved, is "substantive" within the meaning that it affords a rule of decision for cases in a federal court.

CONCLUSION

Respondent respectfully requests the Court to affirm the judgment of the Court of Appeals.